DIGEST OF OPINIONS

OF THE

JUDGE ADVOCATE GENERAL OF THE ARMY

COMPRISING BULLETINS, WAR DEPARTMENT, 1917
Nos. 26, 34, 42, 49, 54, 67, 72, and 75,

TOGETHER WITH

DIGESTS OF CERTAIN OTHER OPINIONS

PUBLISHED IN

OPINIONS OF JUDGE ADVOCATE GENERAL, VOL. 1, 1917.

APRIL 1, 1917, TO DECEMBER 31, 1917

WASHINGTON
GOVERNMENT PRINTING OFFICE
1920

War Department

Document No. 976

Office of The Adjutant General

WAR DEPARTMENT,
WASHINGTON, *March 1, 1920.*

The following bulletins of the War Department, 1917, Nos. 26, 34, 42, 49, 54, 67, 72, and 75, together with digests of certain other published opinions, are republished for the information of the service in general.

[016.2, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
General, Chief of Staff.

OFFICIAL:

P. C. HARRIS,
The Adjutant General.

TABLE OF CONTENTS.

NOTE.

Numbers and letters appearing in captions refer to sections in Dig. Ops. J. A. G. 1912.

DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY.

BULLETIN 26.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

AVIATION PAY: Officers on balloon duty.

Upon the question raised as to whether or not officers required to make regular and frequent aerial flights in balloons are entitled to extra pay authorized by section 13 of the national defense act of June 3, 1916:

Held, that such officers are entitled to the extra pay authorized by the statute; that the act of July 18, 1914 (38 Stat. 514), creating the aviation section and prescribing the duties of the same expressly charged that section with the duty " of operating or supervising the operation of all military aircraft, *including balloons and aeroplanes;*" that in authorizing the increase of pay to officers on duty requiring them " to participate regularly and frequently *in aerial flights*," the act made no distinction as to the kind of aerial craft; and that the national defense act, while dealing with the organization, compensation, etc., of the aviation section, leaves in force the provision of the act of July 18, 1914, prescribing the duties of that section, and, like the act of July 18, 1914, makes no distinction with respect to the character of aerial craft; but the law requires that the officer, while receiving this pay, shall be on duty requiring him to participate regularly and frequently in aerial flights, having regard to the nature of the craft in which such flights are taken; and this must be the real duty of the officer under his assignment.

Ops. J. A. G. 72–181, Apr. 3, 1917.

DESERTERS: National Guard in Federal service.

The question was presented whether deserters from the National Guard in Federal service continue liable to arrest after muster out of Federal service of all the National Guard; and if so, whether rewards are payable for such arrests.

Held, that the crime of desertion being complete upon breach of the obligation to serve, the continued amenability is in no way related with continuance in the service of the organization from which the deserter absented himself, and that therefore deserters from the National Guard in Federal service continue amenable to arrest until discharged or until the running of the statute of limitations, and such delinquents are deserters from the Army within the meaning of the statutes authorizing payment of rewards.

Ops. J. A. G. 26–200, Mar. 26, 1917.

ENLISTED MEN: Absence without leave after revocation of furlough.

A letter revoking the furlough of an enlisted man was sent to the place designated by him as his address but failed of delivery because he had removed therefrom without notifying his proper superiors. Later a friend notified him that he had been dropped as a deserter. He paid no attention to this, but reported back at the expiration of his furlough.

Held, that having been put on inquiry and having omitted to inquire he was chargeable with all the facts which by proper inquiry he might have ascertained, and that he should therefore be regarded as having been absent without leave from the date he was apprised that he had been dropped as a deserter until his return to military control.

Ops. J. A. G. 2–135, Apr. 4, 1917.

FIELD OFFICERS: Detached service.

A field officer of Infantry, who served as judge advocate of the punitive expedition, inquired whether such service should be regarded as detached service or duty with an organization within the meaning of existing detached service legislation relating to field officers.

Held, that as at least two companies of Infantry entered into the composition of the command with which this officer was serving he was, under a recent decision of the Secretary of War overruling the opinion of this office of January 3, 1917, entitled to have the period in question credited as service with an organization.

Ops. J. A. G. 6–124.3, Apr. 5, 1917.

GOVERNMENT PROPERTY: Unlawful purchase of.

A report was submitted with reference to the failure of the Federal grand jury, Del Rio, Tex., to find indictments in the case of—

(*a*) A saloon keeper wearing an olive-drab sweater and an olive-drab shirt, both Government issue, and

(*b*) A ranchman having in his possession one Colt's automatic pistol, caliber .45, Government issue, with indications thereon of an attempt to obliterate the Government marks.

Section 35 of the Penal Code prescribes a penalty for knowingly purchasing or receiving in pledge from any soldier, etc., military property, including arms and clothing; and section 1242, Revised Statutes, forbids the sale, etc., of such property and prescribes that "the *possession of any such property* by any person not a soldier or officer of the United States shall be *prima facie evidence* of such sale," etc.

Held, that inasmuch as the articles bore plain indications that they were articles of Government issue, the sale of which is forbidden by law, the possession of them, in connection with evidence showing their issue and that they were missing, should be regarded, in view of the provision of section 1242, Revised Statutes, as prima facia evidence of the unlawful sale, sufficient to warrant an indictment.

Held further, that as, under the law, a finder of goods who appropriates them to his own use where there is a reasonable clue to ownership thereof is guilty of larceny (25 Cyc. 35–38); and as the articles

in these cases bore plain indications that they were articles of Government issue, the possession of the same under circumstances showing an intent to appropriate them to the use of these parties should be regarded as prima facie evidence, sufficient to warrant the finding of indictments for larceny thereof.

Advised, therefore, that a competent officer be instructed to confer with the United States attorney with a view to the presentation of such evidence as will be required to secure indictments by the grand jury in such cases.

Ops. J. A. G. 80–030, Apr. 14, 1917.

LEASE OF GOVERNMENT PROPERTY: Revocation of.

An electric company holding a lease of a Government electric power plant applied for a revocation of its lease, to take effect seven months prior to its expiration, for the reason that it had disposed of its plant to another company, and had therefore discontinued its use of the Government plant. The lease contained a provision for its annulment or revocation at any time by the Secretary of War.

It appeared that no advantage would come to the United States through the revocation of the lease, as no use would be made of the property, and also that there was no objection to its revocation, other than the loss of revenue to the Government by reason thereof.

Held, that the provision in the lease for its revocation at any time by the Secretary of War was intended to be exercised in the interests of the Government, and not for the purpose of relieving the lessee from its obligation under its contract, and that the Secretary of War was without authority to grant the revocation applied for, as such action on his part would amount to a surrender of property rights of the Government.

Ops. J. A. G. 80–722.4, Apr. 14, 1917.

LINE OF DUTY: Death occurring in duty status.

An officer on duty status was killed while engaged in normal and proper recreation. The Pension Bureau refused his widow a pension. Query: Did the death occur in line of duty within the administrative determination of the War Department? The Pension Bureau interprets the words "death due to military service in line of duty," as they are used in the pension law, as admitting only deaths where an act of military duty is related to the death as an effective cause. Congress itself has interpreted the words to refer only to the status of the deceased at time of death. The War Department adopts the latter construction and has consistently construed casualties as due to military service in line of duty wherever the person suffering them was on a duty status under competent orders and engaged in occupation or recreation proper and normal to persons in that status. Tested by this rule, *held*, that this casualty was due to military service in line of duty. It is unforunate that the construction of this law is not consistent in both departments, but, after careful consideration, this office can concede nothing of its own view of the meaning of these words.

Ops. J. A. G. 42–520, Mar. 24, 1917.

NATIONAL GUARD RESERVE: Discharge from Reserve to permit enlistment in National Guard.

It being proposed to discharge National Guard reservists with a view to their immediate reenlistment in regiments of the National Guard: *Held*, that without considering how far the President legally *can* go in authorizing wholesale discharges from the National Guard Reserve, it is enough to say that the national defense act contemplates a well-defined function for the National Guard Reserve and its continuance for the performance of that function; that it would defeat the purpose of the law to authorize discharges on the considerations mentioned; and that in the absence of any showing of convenience to the Government such discharges ought not to be authorized.

Ops. J. A. G. 58–052, Apr. 3, 1917.

NATIONAL GUARD RESERVE: Transfer to, of administrative staffs.

The Secretary of War having approved the opinion of this office that certain officers of the administrative staffs of the several States did not constitute a part of the National Guard as organized under the national defense act, a further opinion was desired on the question whether such officers could be transferred to the National Guard Reserve under section 77 of the national defense act of June 3, 1916, which provides that—

"Officers of said guard rendered surplus by the disbandment of their organizations shall be placed in the National Guard Reserve."

Held, that this section has no application to officers appointed for State administrative purposes and who have not been appointed to offices having any place in the organization of the units actually maintained by the respective States.

Held further, that the authority conferred by section 78 of the national defense act for the organization of the National Guard Reserve "in each State," etc., to "consist of such organizations, officers and enlisted men, as the President may prescribe," contemplates a reserve to the active organizations maintained in the State, and that it can therefore have no officers other than those of the character provived for the active organizations maintained in the particular State.

Ops. J. A. G. 58–213, Apr. 12, 1917.

PHILIPPINE ISLANDS: Acts of Congress relating to rifle clubs not applicable to.

In connection with steps taken to organize a civilian rifle club at Manila, P. I., the question was presented whether the provisions of the acts of Congress of March 3, 1905 (33 Stat. 986), and April 24, 1914 (38 Stat. 370), relating to the sale and issue of rifles, ammunition, etc., to rifle clubs were applicable to the Philippine Islands.

Held, that neither one of the acts mentioned is applicable to the Philippine Islands, it being expressly provided in the Philippine organic act that section 1891 of the Revised Statutes, which declares that—

"The Constitution and laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and in every Territory hereafter organized as elsewhere within the United States"—

shall not apply to the Philippine Islands.

Ops. J. A. G. 80–140, Apr. 13, 1917.

PROVISIONAL SECOND LIEUTENANTS: Discharge prior to expiration of statutory provisional period.

The discharge of a provisional second lieutenant after six months' service as such was asked on the ground that he lacked the mentality requisite for an officer and had demonstrated that he could never reach the standard that should be required of an officer; thus presenting the question whether the provisional appointment of a second lieutenant might be terminated on account of failure to demonstrate suitability and fitness for permanent appointment prior to the termination of the two years mentioned in section 23 of the national-defense act.

Held, that the word "provisional" occurring in that portion of section 23 of the national defense act reading:

"Hereafter all appointments of persons other than graduates of the United States Military Academy to the grade of second lieutenant in the Regular Army shall be provisional for a period of two years, at the close of which period such appointments shall be made permanent if the appointees shall have demonstrated, under such regulations as the President may prescribe, their suitability and moral, professional, and physical fitness for such permanent appointment; but should any appointee fail so to demonstrate his suitability and fitness, his appointment shall terminate"—

relates only to the alternative action permitted at the end of the period designated and carries no authority to terminate the appointment within that period; that the terms of the section quoted plainly allow to the provisional appointee a period of two years in which to acquire and demonstrate suitability and fitness; and that during that period the provisional appointee may be removed from office only by the same means by which a permanent officer may be removed.

Ops. J. A. G. 64–213.1, Mar. 21, 1917.

REGULAR ARMY RESERVE: Grade of first class private, Engineer Corps.

A company commander of Engineers inquired whether he was correct in placing on the rolls as *privates* the names of reservists recalled to the colors for active duty and assigned to his company, when such reservists had been furloughed as *first class privates*, or if he should have carried them as *attached privates, first class*, and assigned them to the first vacancies in that grade. His doubt was due to the fact that section 11 of the national defense act of June 3, 1916, specifies as a component part of an Engineer company, first class privates and privates, whereas the old law (sec. 11 of the act of Feb. 2, 1901) prescribed first class privates and second class privates.

Held, that it evidently was not the intention of Congress by the change in the designation of the two grades mentioned to abolish the old grades and create new ones, since the pay remains the same, and section 28 of the national defense act, which declares that "hereafter the monthly pay of men of certain grades of the Army *created in this act* shall be as follows, namely," does not include the grade of private, first class, Engineer Corps, nor private, Engineer Corps, and that therefore the reservists referred to by the company commander should have been carried on the rolls as privates, first class, Engineer Corps, and paid as such, in accordance with the pro-

visions of paragraph 86 of the Regulations for the Regular Army Reserve, 1916.

Ops. J. A. G. 6–310, Apr. 2, 1917.

REGULAR ARMY RESERVE: Grade of wagoner of Cavalry.

An enlisted man who was furloughed to the Regular Army Reserve in the grade of *wagoner* of Cavalry was, upon being recalled to the colors for active duty by the President's summons of July 18, 1916, taken up and carried on the rolls as *private*, under the view that the grade of wagoner of Cavalry was abolished by the national-defense act of June 3, 1916.

Held, that the grade of wagoner of Cavalry was not abolished by the national defense act, but was preserved in the supply company created for each regiment of Cavalry as provided by section 18 of that act, and that therefore the soldier under consideration was entitled to be carried on the rolls in the grade of wagoner of Cavalry and paid as such, in accordance with paragraph 86 of the Regulations for the Regular Army Reserve, 1916.

Ops. J. A. G. 6–310, Mar. 29, 1917.

TRAVEL ALLOWANCES: Mutual transfer of officers.

A first lieutenant, unassigned, was attached temporarily to a regiment in the Canal Zone for duty. After receiving a regular assignment and orders to join his regiment in the States, he arranged a mutual transfer with an officer of the regiment to which he had been temporarily attached in the Canal Zone, and in pursuance with the request of the two officers orders were issued announcing the transfers, and it was directed therein that "each officer will proceed to join his regiment to which transferred." The officer who was thus required to join his regiment in the States protested against having to make the change at his own expense for transportation, under the view that the other officer would have been entitled to travel allowances and that as he merely took the other officer's place he was entitled to travel allowances.

Held, that the department could not change the fact that the transfer of this officer was in compliance with his own request and for his own convenience; that it was proper, if not essential, to state in the order of transfer that the change was the result of a transfer requested by the two officers, and this being so, it would clearly have been contrary to the specific provisions of Army Regulations 1297 to specify in the order that the travel was necessary in the military service, and that, therefore, under the regulations the officer was not legally entitled to travel allowances.

Ops. J. A. G. 94–210, Apr. 4, 1917.

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

APPROPRIATIONS: Reimbursement for services rendered by one executive department for another.

In an emergency a dredge of the Engineer Department of the Army rendered service in rescuing a barge of the Public Health Service of the Treasury Department, which had been sunk in a harbor

during a gale and which lay in a position endangering the station buildings. The Engineer Department submitted to the Treasury Department a voucher for reimbursement of the expenses incurred, including pay and subsistence of dredge crew for two days, and for coal, oil, depreciation of dredge, etc., amounting to $179.96.

Held, that while in general where the agencies of one executive department of the Government renders service to another such department and for its particular benefit, reimbursement to the department rendering the service should be made, yet where such services are performed in an emergency for the protection of Government property and hence for the common good of the Government rather than for the benefit of the particular department aided, no such reimbursement should be made.

Comp. Treas. Mar. 3, 1917.

COAST ARTILLERY BANDS: Grade of mess sergeant.

The following questions were presented for decision:

(*a*) May band sergeants of Coast Artillery bands be *detailed* as mess sergeants?

(*b*) If band sergeants may be so detailed, are they entitled to additional pay at the rate of $6 per month?

(*c*) Or, is it the intention of the law that the 263 mess sergeants authorized in the act of June 3, 1916, shall suffice for all organizations of the Coast Artillery Corps?

Section 20 of the national defense act of June 3, 1916, provides that—

"The Coast Artillery Corps shall consist of * * *; 263 mess sergeants; * * *; and 18 bands, organized as hereinbefore provided for the Engineer band. * * *"

The plan of organization of the Engineer units is provided for in section 11 of the same act. The grade of mess sergeant is included in each company, but not specified for the band organization.

Held, that the organization of each of the 18 bands of the Coast Artillery Corps being legally the same as that of the Engineer band, the grade of sergeant is not included, since this grade is not included in the Engineer Corps as prescribed by statute. It is the intention of that law that the 263 mess sergeants authorized in section 20 of the act of June 3, 1916, shall suffice for all organizations of the Coast Artillery Corps, and band sergeants of said corps may not be detailed as mess sergeants.

Comp. Treas. Apr. 10, 1917.

ENLISTED MEN: Aid to dependent families.

The following questions were submitted for decision:

(*a*) Are the families of enlisted men belonging to National Guard organizations which were in the service of the United States under the President's call of June 18, 1916, and which were mustered out of said service, entitled to the benefits of the act of August 29, 1916, as amended, while in the service of the United States under the President's call of March 25, 1917?

(*b*) Are the families of enlisted men belonging to organizations brought into the Federal service under the President's call of June 18, 1916, still entitled to the benefits of the act of August 29, 1916, as amended, where such organizations remain continuously in service

under said call pursuant to the orders suspending the original orders for their muster out?

(*c*) Are the families of enlisted men of the Regular Army entitled to the benefits of the act of August 29, 1916, as amended, so long as there remain in the service of the United States any organization of the National Guard under the call of June 18, 1916, or do the benefits of the statutes extend to include such period as National Guard organizations may be in the service of the United States under the call of March 25, 1917?

Held, that the legislation for the relief of dependent families of soldiers (act of Aug. 29, 1916, as amended by the act of Sept. 8, 1917, 39 Stat. 649, 801) was enacted with reference to enlisted men belonging to National Guard organizations brought into the service under calls made by the President prior to such legislation, and to enlisted men of the Regular Army in active service during the continuance of the National Guard service under such calls, and to none others; and that in order that those organizations responding to the call of March 25, 1917, and those retained in service, as specified in that call, may be on an equal footing, so far as family benefits are concerned, it must be held that they are all in the service under the call of March 25, 1917, those organizations which had not been discharged but were retained in the service having ceased to be in the service under the call of June 18, 1916, from and after March 25, 1917. All three questions should, therefore, be answered in the negative.

The present crisis in national affairs has brought on new conditions, and Congress being in session at this time if it desires to continue the payment for the support of the families of enlisted men of National Guard organizations brought into the service or continued in the service under the President's call of March 25, 1917, and of certain enlisted men of the Regular Army, legislation expressive of such desire should be enacted at this time. There will thus be an opportunity to place all on an equal footing.

Comp. Treas. Apr. 9, 1917.

PURCHASE OF SUPPLIES: Envelopes for headquarters of military departments.

The acts of January 12, 1895 (28 Stat. 624), and June 26, 1906 (34 Stat. 476), are to the general effect that envelopes for the use of the executive departments of the Government and all branches of the service coming under their jurisdiction are to be purchased exclusively by the Postmaster General upon requisitions of such executive departments, etc. In a decision of July 22, 1913 (20 Comp. Dec., 34), the Comptroller of the Treasury held that the act of June 26, 1906, precluded the purchase of envelopes from the appropriation "Contingencies, headquarters of military departments, etc.," otherwise than as authorized by that act, and that the discretion conferred upon division or department commanders in that appropriation with respect to expenditures could not be regarded as authorizing a purchase otherwise prohibited by law. Commencing with the fiscal year 1915, the appropriation "Contingencies, headquarters of military departments, etc.," named stationery among the objects for which the appropriation might be expended, and the question was presented whether the inclusion of stationery among such objects operated as

a repeal *pro tanto* of the prohibitory statutes respecting the officer authorized to purchase envelopes.

Held, that the fact that stationery was named in the appropriation among the objects of authorized expenditure thereunder merely increased specifically the number of heads of lawful expenditures and had no effect whatever on the manner in which such expenditures were to be made, and that, therefore, expenditures for envelopes of headquarters of military departments, etc., of the Army are still to be made in the manner indicated by the acts above cited.

Comp. Treas. Jan. 29, 1917.

REGULAR ARMY RESERVE: Forfeiture of mobilization and active reserve pay by court-martial sentence.

In the case of an enlisted man of the Regular Army Reserve called to the colors for active service who was convicted by general court-martial and sentenced to be dishonorably discharged "and to forfeit all pay and allowances now due and to become due while under confinement under this sentence,"

Held, that the sentence operated to forfeit not only the unpaid pay for active service which became due and payable monthly and the balance, if any, due the soldier on account of clothing and other allowances, but included as well the amounts which had become due the soldier upon his reporting for active duty in response to the President's summons, known as mobilization and reservist's pay, which had not been paid him at the time of his conviction and sentence, this view being in consequence with the decision of the Supreme Court in the *Landers case* (92 U. S. 80), in which it was held—

"The bounty which the petitioner claimed was included in the allowances forfeited. Under the term 'allowances' everything was embraced which could be recovered from the Government by the soldier in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay."

In the instant case the soldier became entitled under section 31 of the act of June 3, 1916, upon reporting for duty and being found physically fit for service, to the sum of $3.07 as reservist's pay, being $2 per month for period from June 3, 1916, to July 18, 1916, and, under the provisions of section 32 of the same act he became entitled to $15.30 as mobilization pay, being $3 per month for the entire period of his furlough from February 16, 1916, to July 18, 1916, inclusive.

Held, that so much of paragraph 86 of the Regulations for the Regular Army Reserve, published August 15, 1916, as specifies $5 per month as the rate of mobilization pay up to June 2, 1916, is invalid.

Comp. Treas. Apr. 20, 1917.

DECISION OF THE COMMISSIONER OF PENSIONS.

FIELD CLERKS: Right to draw pension while serving as such.

The question was submitted to the Commissioner of Pensions whether the acceptance of the position of field clerk (act of Aug. 29, 1916, 39 Stat. 625) by a civil service clerk receiving a pension would operate to cut off his pension in view of the War Department's ruling

that field clerks are part of the Military Establishment and not subject to the civil service rules and regulations.

Held, that since the appointment of such clerks is vested in the Secretary of War, they must be deemed as officers, and whether they be designated in military parlance as commissioned officers or non-commissioned officers is immaterial so far as the pension laws are concerned, the established rule being that one who serves under a commission or appointment from the Secretary of War is a person in the military service for pensionable purposes (*Stout case*, 19 P. D., 149); and that, therefore, under section 4724, Revised Statutes, and the act of March 3, 1891 (26 Stat. 1082), no pension can lawfully be paid to a person holding the position of field clerk covering the period of such service. *Advised*, however, that this ruling is subject to approval or modification of the Secretary of the Interior upon the appeal of any pensioner from the action of the Pension Bureau in dropping his name from the pension rolls because of his appointment and service as a field clerk under the act of August 29, 1916.

Commissioner of Pensions, Apr. 11, 1917.

BULLETIN 34.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CLOTHING, MILITIA: Approval of survey.

In order to facilitate action on the property account of militia authorities of Hawaii, it was proposed to delegate to the commanding general, Hawaiian Department, authority to act for the Secretary of War on reports of survey for the Territory of Hawaii. Section 87, act of June 3, 1916, provides that—" if it shall appear to the Secretary of War from the record of survey that the property was lost, damaged, or destroyed through unavoidable causes, he is hereby authorized to relieve the State or Territory or the District of Columbia from further accountability therefor," but that if damaged through negligence, the money value of the property is to be charged to the State, etc., and " to be paid from State, Territory, or District funds, *or any funds other than Federal.*" Upon the question whether the proposed authority could be delegated,

Held, that the statute confers upon the Secretary of War a discretionary or judicial authority, not a ministerial one, and that within well-settled rules of law such authority can not be delegated as proposed; and that the action should be limited, therefore, to authorizing the examination of such reports by the department commander, the same to be forwarded to the War Department with his recommendation for final action by the Secretary of War.

Ops. J. A. G. 58–314, May 8, 1917.

CONTRACT: Correction of error in bid.

Upon the question raised as to the legality of accepting the bid of the lowest bidder for certain electric installation as corrected by letter submitted following the opening of bids, it appearing that the bid as originally submitted was so much lower than the other bids as to indicate a mistake; that upon inquiry it was found that the wrong totals had been given for the transmission line; and that the bid as corrected was about 25 per cent lower than the next higher bid;

Held, that the fact that the error occurred as claimed being clearly established, there is no legal objection to accepting the bid as corrected; and that such action is in accordance with precedents cited in Dig. Ops., J. A. G. 1912, pp. 330 and 331.

Ops. J. A. G. 76–240, May 7, 1917.

CONTRACT: Percentage basis.

Upon the question whether or not contracts can legally be made for such medical supplies as gauze dressings on the basis of cost of producing the article plus a reasonable profit;

Held, that in view of the existing emergency the statutes requiring advertising in the letting of such contracts are not operative, and that there can be no legal objection to such a contract as is proposed.

Further remarked, that the proposed method of making contracts, on the basis of cost plus a percentage, is being applied under the existing conditions of emergency by the War and Navy Departments not only in procuring supplies but in construction work.

Ops. J. A. G. 76–334, May 3, 1917.

DISCHARGE: Under proper name when service was under assumed name.

A soldier who served under an assumed name in one enlistment during the Philippine insurrection and was honorably discharged therefrom, but was dishonorably discharged from a subsequent enlistment, requested a discharge under his true name from his first enlistment.

Held, that the act of August 22, 1912, prescribing "that the Secretary of War and the Secretary of Navy be, and they are hereby, authorized and required to issue certificates of discharge or orders of acceptance of resignation, upon application and proof of identity, in the true name of such persons as enlisted or served under assumed name, while minors or otherwise, in the Army or Navy during any war between the United States and any other nation or people and were honorably discharged therefrom," is mandatory, and is applicable to the cases of all soldiers who served under assumed names during the Philippine insurrection and were honorably discharged; and that the character of the separation of the soldier from the service after a subsequent enlistment is a distinct matter which does not affect the duty of the Secretary of War with respect to the previous enlistment from which the soldier was honorably discharged and to which the statute applies without qualification.

Ops. J. A. G. 28–521, Apr. 28, 1917.

ENLISTED MEN: Making good time lost.

The question was presented whether, in view of the provisions of the new 107th Article of War, an enlisted man is required to make good time lost prior to March 1, 1917, which he was not required under the old law to make good.

Held, that the 107th Article of War, being a reenactment of existing legislation on the subject of making good time lost by enlisted men, with the added provision that it applies to all existing enlistments, does not require the making good of any time lost prior to March 1, 1917, *which was not required by the old law to be made good*, but does require *all* time lost on and after March 1, 1917, due to the causes mentioned in the 107th Article of War, to be made good, regardless of the date of enlistment; in other words, that the new law differs from the old in that while the old law was held not to operate upon enlistments entered into prior to the enactment of such law, the new article of war, in addition to requiring fulfillment of all past obligations incurred under the old law, applies to all time lost in future, commencing March 1, 1917, due to the causes mentioned in the article, in *all* enlistments.

Ops. J. A. G. 34–052, Apr. 30, 1917.

FIELD CLERKS: Enlistment in National Guard.

Upon inquiry (*a*) whether Army field clerks and field clerks, Quartermaster Corps, are exempt from militia duty, and (*b*) whether their enlistment in the National Guard is prohibited—

Held, as to (*a*), that since Army field clerks and field clerks, Quartermaster Corps, now occupy a status in the military service of the United States, they come within the provisions of section 59 of the national defense act, which exempts "persons in the military and naval service of the United States" from militia duty, and therefore are exempted from such duty.

Held, as to (*b*), that the National Guard is plainly designed by the national defense act to be an effective force and to supplement the permanent military forces of the Nation, and that it is plainly the intent of the law governing its organization that its members shall be available for any service which it may be called upon to perform, and not be prevented from performing such duty by any paramount obligation in the permanent military force. This intent is clearly indicated by the exemption of persons in the military and naval service of the United States from militia duty, above cited. That special authority of law is necessary to justify the occupancy of status in both the Regular Army and the National Guard by the same person is indicated by the authority expressly conferred by section 100 of the national defense act for officers of the Regular Army to accept commissions in the National Guard with the permission of the President and terminable at his discretion. There is no such authority for any persons in the active military service of the United States, other than officers, to occupy such dual status. Therefore, the effect of the law governing the organization and maintenance of the National Guard is to render a status in the active permanent Military Establishment incompatible with a status in the National Guard. The enlistment of Army field clerks and field clerks, Quartermaster Corps, is therefore, in effect, prohibited by law.

Ops. J. A. G. 58–051, Mar. 27, 1917.

FIELD CLERKS: Heat and light allowance.

Upon request for reconsideration of the Judge Advocate General's opinion of February 8, 1917 (Bul. 15, W. D. 1917, p. 5), the following reply was made:

"This office has very carefully reconsidered the question whether field clerks are entitled to fuel and light allowances in public quarters, and I regret to say that I find in the comptroller's decision of March 9, 1917, referred to by Mr. G. W. Cooke, field clerk, Quartermaster Corps, nothing to warrant changing the views of this office on the subject. (Bul. 15, W. D. 1917, p. 5.)

"In his decision of March 9, the comptroller held that the provision of the act of June 3, 1916, giving pay clerks, Quartermaster Corps, the rank, pay, and allowances of a second lieutenant, operated to give the pay clerks of the Marine Corps the pay and allowances of a second lieutenant of the Army. The reasons therefor will not, in my opinion, support Mr. Cooke's view that the same decision will warrant the conclusion that field clerks of the Army are entitled to the allowances of a second lieutenant. The act of June 24, 1910, provided that the clerks to assistant paymasters in the Marine Corps 'shall receive the same pay, allowances, and other benefits as are now or *may hereafter* be provided for paymasters' clerks of corresponding length of service in the United States Army'; while

the act of August 29, 1916, establishing the positions of field clerk provides that such clerks having the requisite service as therein prescribed 'shall receive the same allowances, except retirement, *as heretofore* allowed by law to pay clerks, Quartermaster Corps.' Inasmuch as it had been the decision of the department theretofore that pay clerks, Quartermaster Corps, were not entitled under the law to fuel and light in kind (Buls. of 1915, No. 5, p. 5, and No. 21, p. 7), it follows that field clerks are not entitled to such allowances, according to those decisions, no provision having been made for them by law in the meantime."

Ops. J. A. G. 6–135, May 14, 1917.

HEAT AND LIGHT: Enlisted men below grade 15 assigned to separate public quarters.

The question was presented whether enlisted men below grade 15, when occupying separate public quarters, to which they have been assigned by proper authority, are entitled to an allowance of fuel therefor. Paragraph 1036, Army Regulations, 1913, authorizes prescribed issue of fuel to officers and enlisted men *entitled to and occupying* public quarters. Paragraph 1044 contains the following provision:

"Enlisted men below grade 15, paragraph 9, may be assigned to separate public quarters whenever the same are available after those noncommissioned officers of higher grades have been accommodated and when the conditions of service appear to the commanding officer to warrant such assignment."

Held, that when such enlisted men are assigned to and occupy separate public quarters, in pursuance of A. R. 1044, they are "entitled to and occupying public quarters" within the meaning of A. R. 1036, authorizing the issuance of fuel therefor.

Ops. J. A. G. 72–410, Apr. 28, 1917.

MILITIA: Members of Organized Militia in National Guard organizations.

In certain National Guard organizations responding to the President's call of March 27, 1917, were found members who had not qualified as national guardsmen under section 70 of the act of June 3, 1916.

Held, that inasmuch as the President's call of March 25, 1917, applied only to the National Guard the soldiers in question, as members of the Organized Militia, were under no obligation to respond thereto, and the fact that they appeared for service in the National Guard organizations did not operate to create any obligation on the part of the Government to pay or provide for them; and that therefore, while they still remained subject as organized militiamen to be called into the Federal service as such, they should be dropped from the National Guard rolls for failure to qualify as national guardsmen.

Ops. J. A. G. 58–051.1, Apr. 12, 1917.

NATIONAL GUARD: Clothing allowance.

Upon the question whether or not a member of the National Guard who was mustered out of the Federal service March 14, 1917, and again enters the Federal service under the call of March 25, 1917, is entitled, on his reentry into the service "to an initial clothing allowance."

Held, that the muster out of the Federal service from the call of June 18, 1916, terminated his Federal service under that call, entitling him to full settlement for such service; that the reentry into the service under the call of March 25, 1917, begins a new period of Federal service, and that he is entitled to the benefits of the laws applicable thereto as a distinct period of Federal service.

Held further, that as the law gives him the right to the same pay and allowances as a soldier of the Regular Army would receive, he should be credited with the regular initial clothing allowance, but the value of the clothing supplied him at Federal expense upon reentry into the service and which he is permitted to retain should be charged against such initial allowance.

Ops. J. A. G. 58–700, Apr. 27, 1917.

NATIONAL GUARD: Continuation of active service.

A soldier in a National Guard organization was, through misinterpretation of the regulations governing the National Guard Reserve, continued in the active service after the expiration of his active enlistment, and it was asked whether he might be continued in the active service and be allowed pay for the time already served.

Held, that, while the term of enlistment prescribed by the national-defense act would seem to involve an automatic passing to the reserve at the expiration of the active period of enlistment, such a deduction can not be held to interfere with the soldier's privilege of continuing in the active service, in view of the proviso of section 69, national-defense act, reading: "that in the National Guard the privilege of continuing in active service during the whole of an enlistment period * * * shall not be denied by reason of anything contained in this act"; and that since the soldier referred to in the inquiry desired to continue in the active service, and actually did so, he may properly be regarded as having legally continued in active service, his service in that capacity having been accepted by proper authority.

Ops. J. A. G. 58–700, Apr. 28, 1917.

NATIONAL GUARD: Failure of members of, to respond to call.

Upon the recommendation that prompt action be taken to apprehend and punish such members of National Guard organizations as may have failed to respond to the call of March 25, 1917:

Held, that the said call embraced only organizations of the National Guard and did not include members of the Organized Militia who failed to qualify under the national-defense act of June 3, 1916; that by the terms of section 101 of that act "The National Guard, when called as such into the service of the United States, shall, *from the time* they are required by the terms of the call to respond thereto, *be subject to the laws and regulations* governing the Regular Army"; that their failure to respond renders them punishable under the Articles of War for disobeying the orders of the President for their mobilization, and, if the circumstances evidence an intent to abandon the Federal service, also for desertion; and that they may be charged with either offense, or both, and tried therefor by court-martial.

Ops. J. A. G. 58–132.1, Apr. 19, 1917.

OFFICERS' RESERVE CORPS: Signal Corps Section.

Held, with respect to the construction of section 37 of the national defense act of June 3, 1916, as applied to the Signal Corps, that the Signal Corps Section of the Officers' Reserve Corps, like the Regular Army, should comprise two divisions—i. e., the Signal Corps proper and the Aviation Section thereof; that the proportion of officers of the several grades in each division should conform to the proportion of the respective divisions of the Signal Corps of the Regular Army, except in the lowest grade; and that such proportion will practically correspond to the organization now prescribed for the units of the respective divisions of the Regular Army.

Held further, that the organization of the units of the respective sections may be proceeded with in the usual manner, provided the units, when complete, will not give a proportion of officers in any grade of the particular section of the Signal Corps in excess of the proportion prescribed in the statute; that the proportion indicated by the statute must be maintained in the particular section of the Signal Corps as a whole, but need not be maintained in a particular unit of that section unless the departure from the proportion in that unit would render the composition of the whole section such as to violate the rule.

Ops. J. A. G. 6–301.6, Apr. 13, 21, and 28, 1917.

PRINTING: Procurement of, for military forces in time of war.

Held, that the provision in the Army appropriation act approved May 12, 1917, amending section 87 of the public printing act of January 12, 1895 (28 Stat. 622), and section 2 of the act of June 30, 1906 (34 Stat. 762), operates to remove, in time of war, the restriction against the procurement of printing from commercial concerns contained in the act of 1895 and the restriction contained in the act of 1906 against the use of any appropriations for printing other than those made specifically and solely for printing and binding, so that in time of war the War Department may procure from commercial or other printing establishments necessary printing for the military forces and pay therefor from "available appropriations."

Held further, that the said amendment of May 12, 1917, does not make available the War Department's allotment at the Government Printing Office for the procurement of printing by the department under contracts with commercial printing establishments.

Ops. J. A. G. 5–113, May 28, 1917.

PRISONERS OF WAR: Right to food supplies and furniture taken from captured vessel.

The former commanding officer of an enemy ship in the status of a captured vessel of war requested that certain food supplies and certain furniture and kitchen utensils be shipped to the members of the crew confined at a military post.

Held, that the proper application of paragraph 64 of the Rules of Land Warfare, reading: "Prisoners are only entitled to what is ordinarily used in the captor's country, but due allowances should, if possible, be made for differences of habits, and captured supplies should be used if they are available," is that captured supplies should be used by the Government for the subsistence and care of prisoners and not that such captured supplies should be turned over to the prisoners.

Held further, that since the furniture and kitchen utensils pertain to the ship itself, and are not private property of the prisoners, the Government is under no obligation to deliver them to the captive crew.

Ops. J. A. G. 99–290, May 15, 1917.

PRISONERS OF WAR: Right to make and sell toys for benefit of German Red Cross.

Upon a question whether prisoners of war might be permitted to make and sell toys for the benefit of the German Red Cross.

Held, that there is nothing in any of the conventions to which the United States is a party which would impose upon the United States a duty to permit prisoners to aid any institutions connected with or serving an enemy of the United States in any capacity; and that the existence of any such right on the part of prisoners is negatived by that part of article 6 of the Rules of Land Warfare, Hague Convention No. 4, of October 18, 1907, reading: " * * * the wages of the prisoners shall go toward improving their condition and the balance shall be paid to them on their release after deducting the cost of their maintenance," thus plainly contemplating that all earnings of prisoners shall be retained in the captor country until the termination of war.

Ops. J. A. G. 99–290, May 15, 1917.

PRIVATE PROPERTY: Claims for loss of, in military service.

By the act of March 4, 1915 (38 Stat. 1077), it was provided that the act of March 3, 1885, relating to the settlement of claims of officers and enlisted men of the Army for the loss of private property destroyed in the military service "shall hereafter extend to cover loss or damage to the regulation allowance of baggage of officers and enlisted men sustained in shipment under orders to the extent of such loss or damage over and above the amount recoverable from the carrier furnishing the transportation." The question was presented whether this provision applies to all property which may be shipped as change-of-station allowance of baggage (including, for example, civilian clothing of the claimant officer and wearing apparel of members of his family) or whether its application is limited to such articles as might otherwise be certified to the auditor by the Secretary of War under the original law of 1885.

Held, that since the provisions of the act of 1885 are, by the act of March 4, 1915, *extended* to the loss or damage to private property in shipment, the *limitations* of the former act are extended, including the provision that "the liability of the Government under this act shall be limited to such articles of personal property as the Secretary of War, in his discretion, shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters engaged in the public service in line of duty"; that it is only because of this limitation that the Secretary of War is required to make any certificate for the auditor in case of the loss of property of officers and enlisted men, and that therefore in the preparation of the certificates, in cases of loss of baggage, there should be listed only such articles as can be properly certified under the act of March 3, 1885.

Ops. J. A. G. 18–461, Apr. 23, 1917.

RESERVE OFFICERS: Not to be assigned as assistants to juniors.

Upon the question whether a reserve officer of the grade of major could be assigned to active service as an assistant to an officer of the Regular Army of the grade of captain,

Held, that since it is provided in section 38 of the national defense act that while reserve officers are on active service they shall, "by virtue of their commissions as reserve officers, exercise command appropriate to their grade and rank in the organizations to which they may be assigned, * * *: *Provided*, That officers so ordered to active service shall take temporary rank among themselves, and in their grades in the organizations to which assigned, according to the dates of orders placing them on active service; * * *" the question must be answered in the negative.

Ops. J. A. G. 6–301, Apr. 18, 1917.

STATUTE OF LIMITATIONS: Trials for desertion.

On the question raised whether the 39th Article of War (new), which became operative March 1, 1917, under the provisions of the act of August 29, 1916 (39 Stat. 670), is applicable to a desertion committed prior to that date,

Held, that the article applies to past offenses with respect to which the old statute of limitation (103d Article of War) had not run at the time of its repeal; that under the usual rule statutes of limitation apply to past offenses (Bishop on Statutory Crimes, 3d ed., secs. 263, 265), and by some authorities even where an existing statute had completely run at the time the new statute became operative; and that the proviso to the 39th Article of War, that it "shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law," was inserted to limit the application of the article to such past offenses as have not, at the time the new statute becomes operative, been "barred by the provisions of existing law."

Held further, that section 5 of the said act of August 29, 1916, prescribing "that all offenses committed, and all penalties, forfeitures, crimes, or *liabilities* incurred prior to the taking effect of this act * * * may be prosecuted, punished, and enforced in the same manner and with the same effect as if this act had not been passed," does not include such a liability as the liability to trial, but refers to liabilities such as to make good time lost, or to some other liability imposed by law and not embraced by the terms immediately preceding it; that there is nothing in the language of the provision to show that it was intended to cover the liability to trial, and that in view of the proviso to the 39th Article of War it must be held that it has no application thereto.

Ops. J. A. G. 26–480, Apr. 26, 1917.

WAR PRISONERS: Pay of officers.

Under Article CVII, Hague Convention (Appendix 6, Field Service Regulations, United States Army, 1914, p. 192) officers taken prisoner are entitled to "receive the same rate of pay as officers of *corresponding rank* in the country where they are detained, the amount to be ultimately refunded by their own government."

Held (1), that the term "officers," as here used, should be limited to "commissioned officers of the enemy army and navy who have

been taken prisoner in naval or military operations or by process of law";

(2) That as the rates of pay of officers of the Army and Navy as fixed by law are the same for officers of both services having the same relative rank as established in paragraph 12, Army Regulations, 1913, there is no objection to a fixed rate of pay for naval and military officers who are taken prisoner, based on the table of relative rank as established in said regulations; and,

(3) That the term "rank," as used in the convention, should be regarded as equivalent to "grade," and as so construed there can be no objection to adopting as a provisional basis of payment the base pay prescribed by law for officers of the corresponding grade of the Regular Army of the United States, without longevity increase or allowances.

Ops. J. A. G. 99–290, May 14, 1917.

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

NATIONAL GUARD: Additional pay of enlisted men as gunners.

The question was presented for decision whether enlisted men of the Organized Militia or National Guard when brought into the service of the United States under the militia act of 1903, as amended, or when drafted into the Federal service under section 111 of the act of June 3, 1916, are entitled to receive additional pay for qualifications as first or second class gunners attained prior to their being brought into the service of the United States.

Held, that inasmuch as the requirements for qualifications as gunners are the same for the enlisted men in the militia or National Guard as for the enlisted men of the Regular Army, and as the laws relating to pay give the militia, when brought into the service of the United States, the same pay and allowances as are or may be provided by law for the Regular Army, they are entitled to the additional pay as gunners under their qualifications attained prior to their being brought into the Federal service, subject to the conditions imposed by paragraph 1344, Army Regulations, 1913.

Comp. Treas. July 21, 1916.

PAY AND ALLOWANCES: Retired officers and enlisted men commissioned in the National Guard.

The following questions were presented for decision:

(*a*) Whether a retired officer of the Regular Army, appointed as an officer of the National Guard and detailed as property and disbursing officer, can receive the pay as property and disbursing officer provided for by section 67, act of June 3, 1916, and the National Guard pay provided by section 109, act of June 3, 1916, in addition to his retired pay of the Regular Army.

(*b*) Whether a retired enlisted man of the Regular Army, appointed as an officer of the National Guard and detailed as property and disbursing officer, can receive the pay as property and disbursing officer provided by section 67 of the act of June 3, 1916, and the National Guard pay provided by section 109 of the act cited, in addition to his pay as an enlisted man, retired, of the Regular Army.

Section 74 of the national-defense act of June 3, 1916, specifying the class from which National Guard officers may be selected, includes retired officers of the Regular Army, but does not include retired enlisted men except as they may become eligible by enlisting in the National Guard.

Held, as to (*a*), that the effect of the statutory provision for the appointment of retired officers of the Regular Army as officers in the National Guard is to give a retired officer so appointed the pay provided for in sections 67 and 109 of the national-defense act in addition to his retired pay in the Army; and, as to (*b*), that, inasmuch as the statute does not provide for the entry of retired enlisted men into the National Guard, previous decisions are applicable (20 Comp. Dec., 49, and 23 *Id.*, 444), which are to the effect that the pay of a retired enlisted man of the Army while in the Federal service as a member of the Organized Militia or National Guard should be discontinued; in other words, that there is no prohibition against the commissioning of a retired enlisted man in the National Guard, after his enlistment therein, and then appointing him property and disbursing officer and paying him therefor from the amount appropriated from Federal funds, but during such time he will not be entitled to continue to draw his retired pay as an enlisted man of the Army. Accordingly, question (*a*) answered in the affirmative and question (*b*) in the negative.

Comp. Treas. May 21, 1917.

RETIRED OFFICERS: Pay on being transferred to the active list.

A retired officer of the Army in the grade of first lieutenant was transferred to the active list March 22, 1917, "with the rank of captain of Infantry from July 1, 1916," under the provisions of the act approved March 4, 1915 (38 Stat. 1068), which authorizes the transfer of retired officers to the place on the active list which they would have had had they not been retired. The officer duly accepted his commission as captain, and thereupon the question was presented whether he was entitled to the difference in pay between the grades of first lieutenant and captain commencing July 1, 1916, the time from which his rank as captain dated under the order transferring him to the active list.

Held, that the date when the officer accepted his commission as captain, and thereby became invested with the office, was the date when the pay as captain commenced, and not before, since the rate of pay is attached to the office and not to the rank which the officer has.

Comp. Treas. May 3, 1917.

RETIRED OFFICERS: Pay under assignment to active duty in time of war.

Section 24 of the national-defense act, approved June 3, 1916, contains the provision:

"That in time of war retired officers of the Army will be employed on active duty, in the discretion of the President, and when so employed they shall receive the full pay and allowances of their grade."

Held, that this provision supersedes previous statutes governing the pay of retired officer assigned to active duty in time of war and

that under such provision all retired officers of the Army placed on active duty in time of war are entitled to the full pay and allowances of their grades; but it has reference only to such officers as are specifically assigned to active duty of a strictly military character under said provision, and does not apply to those detailed as instructors in educational institutions.

23 Comp. Treas. 577; *id.* 605.

DECISIONS OF THE COURTS.

CONTRACTS: Construction of.

A meat-packing company contracted with the Navy Department to furnish to the navy yard at Puget Sound, Wash., or to vessels docking thereat, during the fiscal year ending June 30, 1908, certain meats, the quantity to be furnished being "165,000 pounds, more or less," according to the requirements of the service. The contract contained this provision:

"The quantities called for above are only estimated, and the right is reserved to exact more than the amount of any article included in the above class at the contract price or to accept less than the full amount thereof, as the needs of the public service may require."

After the contract was entered into the President decided to send the Atlantic Fleet around the world, and the contractor was required, over his protest, to furnish at the contract price meat to vessels of that fleet touching at the Puget Sound Navy Yard. The quantity thus furnished to the Atlantic Fleet was 200,983 pounds, which cost the contractor $21,767.80, and for which the contractor received from the Government $17,531.71, the price of meat having risen subsequent to the date of the contract. The contractor brought suit, insisting that its contract only required it to furnish meats to the vessels of the Pacific Fleet which might dock at the Puget Sound Navy Yard during the fiscal year, and that it could not be required to furnish meats at contract rates to the vessels of the Atlantic Fleet docking at that station, and that the contractor was therefore entitled to recover from the Government the market price of all meats furnished by it to the vessels of the Atlantic Fleet, less the amount paid based on the contract price.

Held, that the claimant could not recover, as there was nothing in the contract indicating that the agreement referred only to the requirements of the Pacific Fleet, and as the quantities of meat to be furnished by the contractor depended upon the determination of the Chief of the Bureau of Supplies and Accounts of the Navy Department, whose decision as to the quantities of meat to be furnished was, by the express terms of the contract, final, and that unless the contractor had been required to furnish a totally unreasonable amount, or unless bad faith was shown, the contractor could not complain, the case being governed by the principle laid down in *Brawley* v. *United States* (96 U. S., 168, 172), where the meaning of the words "more or less" is discussed thus:

"If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by

such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and that variation from the quantity named will depend upon his discretion and requirements so long as he acts in good faith."

Carstens Packing Co. v. *The United States*, decided by the Court of Claims May 28, 1917.

HORSES: Claims for loss of, in military service.

In a recent case (*Frank M. Andrews* v. *The United States*, decided Apr. 30, 1917) the Court of Claims disposed of a number of claims of officers of the Army for loss of horses in the military service, such suits having been brought under the act of March 3, 1885 (23 Stat. 350), which provides for the reimbursement of officers and enlisted men for the loss of private property in the military service under conditions therein specified. (Previous decisions of the Court of Claims were in suits brought under other statutes, relating to horses lost in time of war. See Bul. No. 8, W. D. 1916, p. 13, and Bul. No. 15, W. D. 1917, p. 15.) The Comptroller of the Treasury finally held in a decision dated October 20, 1913 (20 Comp. Dec. 238), that the act of March 3, 1885, did not apply to horses. In the recent decision in the *Andrews* case, the Court of Claims held that the act of 1885 does authorize reimbursement to officers for horses lost in the military service, *in time of peace*, under the circumstances mentioned in the act. The court defined some of the limitations of the act as follows:

"It does not follow from what has been said that every horse privately owned which dies while its owner is in the military service can be paid for. Congress did not intend by the provisions of the act of 1885 to make the Government an insurer against loss or destruction of a soldier's private property. The officer or enlisted man must be in the military service of the United States and the loss of his private property must likewise have been in the military service, not merely *while* in the military service but by reason of some exigency or necessity of the military service and not incident to a horse out of as well as in that service. An analysis of the statute in this respect is most succinctly stated by Assistant Comptroller Bowers (3 Comp. Dec. 636): 'The loss must have been caused by some exigency or necessity of the military service, such as naturally would be attributed to and would flow from such service. To establish a case under this act the property must have been *lost or destroyed in the military service;* not merely while it was in use in that service, but *because it was in that service.* Being in that service must have been the proximate cause of the loss. The loss must *not* have been caused by the natural wear and tear or deterioration of the articles in ordinary use in the service. Inherent defects in articles, on account of which they are unable to stand the ordinary strain of the service, will prevent recovery.'

"Congress by the remedial legislation in issue was providing reimbursement for property lost by reason of the peculiar hazards to which it was exposed while in military service, and by so doing did

not intend to cover the whole field of accidental loss or destruction in no way connected with the dangers incident to military service; simply because the soldier had carried his private mount into the military service to be used by him in military activities as his military duties required such a use does not of itself render the defendants liable for its death if the same ensued from any cause not directly connected with or incident to military service. * * * While the line of demarcation may in some instances be difficult of ascertainment, still the intendment of the statute is open and apparent. The term '*in the military service*' has a settled and universally accepted legal meaning and would not appear in the act if it was not designed to limit liability for the loss and destruction of private property occurring by reason of and in the actual performance of military duty."

In view of these limitations certain claims were disposed of as follows:

(*a*) Where an officer's horse that had been put in a quartermaster's pasture while the officer was away from the post on leave, and it was discovered with a serious fracture of its foreleg, necessitating its being shot, *held*, that the officer could not recover, as there was nothing in the record to connect the injury with the military service.

(*b*) Where an officer's horse was in charge of the Quartermaster's Department and being led by an attendant through the streets of Seattle, Wash., to be placed on board a transport for shipment to the Philippine Islands and was so injured when it slipped and fell on the asphalt pavement that it had to be shot, *held*, that the claimant could not recover, as the horse's death was purely accidental, there being nothing in the record to connect the loss with the requirements of the act of 1885.

(*c*) An officer's horse died of acute enteritis, which two veterinarians pronounced as having been caused by unwholesome forage provided for it by the Government. *Held*, that the horse was lost in the military service due to one of the unavoidable infirmities of the military system of feeding military horses, and that the claimant was entitled to recover.

(*d*) An officer's horse died of cerebrospinal meningitis. He had been ridden by the officer and "came in rather warm." The same evening the horse became ill. The next day he developed congestion of the lungs and died as the result. *Held*, that the officer could not recover, as the horse obviously died from illness not incident to the military service.

Other cases were dismissed because the claimants had not filed a claim with the auditor within two years after the loss occurred, as required by the act.

LEASES: Payment of rent by Government.

The Government leased premises for a post office, and during the life of the lease the premises were sold under a mortgage foreclosure. Under the terms of the lease the annual rental was payable in quarterly installments on the first days of October, January, April, and July. The new owner took title November 23 and claimed the rental for the whole of that quarter, payable January 1. The demand was refused and the Government apportioned the rental between the old and the new owners, the latter being paid only from the date

when he took title to the premises, November 23, 1912. In an action by the new owner in the Court of Claims,

Held, that he was entitled to the rent for the whole quarter under the well-settled common law rule that in cases like this the apportionment of rent is not allowable, as the rent does not accrue from day to day, but only accrues at the time it becomes due under the terms of the lease and is indivisible.

Musselman v. *United States*, decided by the Court of Claims May 28, 1917.

PAY AND ALLOWANCES: Longevity pay of members of Medical Reserve Corps.

In the case of *Yeamans* v. *United States*, decided by the Court of Claims May 7, 1917, the plaintiff, while serving as a contract surgeon of the Army, had been appointed a member of the Medical Reserve Corps in accordance with section 7 of the act of April 23, 1908 (35 Stat. 66), and he claimed that he was entitled to longevity increase upon his services as contract surgeon. Section 9 of the act of April 23, 1908, provided:

"That officers of the Medical Reserve Corps, when called upon active duty in the service of the United States, as provided in section 8 of the act, shall be subject to the laws, regulations, and orders for the government of the Regular Army, and during the period of such service shall be entitled to the pay and allowances of first lieutenants of the Medical Corps with increase for length of service now allowed by law, said increase to be computed only for time of active duty."

Held, that this legislation was prospective in its character and operation and does not contemplate the computation of former service in fixing the longevity pay of the officers rendering service in the Medical Reserve Corps; that the plain meaning of the language quoted is that officers of the Medical Reserve Corps shall only receive longevity pay while they are on active duty in the active service of the United States in the Medical Reserve Corps, and that no service performed elsewhere, even though performed in other branches of the military service, can be computed in determining the longevity pay provided for in this statute.

BULLETIN 42.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ALLOTMENT OF PAY: Purchase of liberty bonds.

On the question raised as to the legality of waiving the provisions of paragraph 1347, Army Regulations, restricting allotment privileges as to soldiers serving within the United States, so as to permit allotments to banking institutions for the purchase of liberty bonds.

Held, that, as the statute pursuant to which the regulation was made (sec. 16, act of Mar. 2, 1899, 30 Stat. 981), authorizes the Secretary of War "to permit enlisted men of the United States Army to make allotments of their pay, under such regulations as he may prescribe, for the support of their families or relatives, *for their own savings*, and for other purposes, during such time as they may be absent on distant duty, or *under other circumstances warranting such action*," the language being broad enough to authorize allotments of pay for the purposes proposed, there can be no legal objections to the issue of instructions authorizing such allotments to be made, and that such instructions will operate as a modification of the regulations so as to permit of the allotments for the purposes in view.

Ops. J. A. G. 72–260, June 13, 1917.

AVIATION OFFICERS: Travel orders.

On the question whether the action of the Secretary of War in authorizing the Chief Signal Officer "to issue orders to officers in the aviation section, Signal Corps, under his immediate command, directing journeys on duty in connection with the aviation service of the Army," extends to officers of the aviation section, Signal Officers' Reserve Corps, under the command of the Chief Signal Officer, traveling on duty in connection with the aviation service of the Army.

Held, that the authority conferred has reference to the provisions in the Army appropriation act, approved May 12, 1917, providing: "That mileage to officers in the aviation section, Signal Corps, traveling on duty in connection with aviation service shall be paid from the appropriation for the work in connection with which the travel is performed;" and that the provision of this act was evidently intended to apply to all travel and duty in connection with the aviation service whether performed by regular or reserve officers of the aviation section, Signal Corps; and that the authority in question should be construed as extending to officers of the aviation section, Signal Officers' Reserve Corps, when traveling on duty in connection with the aviation service of the Army.

Ops. J. A. G. 94–210, June 13, 1917.

BONDS OF DISBURSING OFFICERS: Reserve officers.

On the question raised as to the proposed action of the Chief of Ordnance in requiring reserve officers assigned to duty as disbursing officers to execute official bonds in limited amounts for the protection of the United States,

Held, that there can be no legal objection to the proposed action; that it is well settled that heads of departments, although there be no statutory provision directing such action, may require bonds from officers for the protection of the United States; and that where public property is intrusted to individuals, although there is no law requiring a bond, the head of a department may properly require one, citing Dig. Ops. J. A. G. 1912, 198.

Ops. J. A. G. 12–110, June 15, 1917.

CONTINUOUS-SERVICE PAY: Delay in reenlistment.

In the case of a sergeant detailed as instructor of the National Guard who was discharged as such to accept a commission in the National Guard and within three months after his discharge applied for information as to whether he could "reenlist and be redetailed as sergeant-instructor," adding, "if authority is granted I will make proper application for reenlistment;" and owing to delay in delivery of the letter advising him that he could reenlist and be redetailed as requested his reenlistment was not accomplished within the period of three months,

Held, on the authority of the decision of the Comptroller of the Treasury, dated June 16, 1914 (W. D. Bul. 33, p. 16), to the effect that where a soldier made application for reenlistment before the expiration of the three months' period, "but on account of delays apparently for the convenience of the Government and without his fault," the enlistment was not accomplished within the prescribed period, the soldier "was entitled to have his reenlistment take effect before the expiration of said three months' period and was entitled to the benefit of his prior service in computing his pay for continuous service;" that the case in reference comes within the reasons of this decision of the comptroller inasmuch as the soldier in his request for information stated that if the authority was granted he would "make proper application for reenlistment;" and that his letter making such request should be regarded as his application for reenlistment, and as bringing him within the decision of the comptroller of June 16, 1914, *supra;* and, therefore, that the soldier should be viewed as having reenlisted within three months after the date of his muster out so as to entitle him to the full benefits of continuous service.

Ops. J. A. G. 72–220, June 1, 1917.

DENTAL CORPS: Appointments.

With reference to the requirement of the act of March 3, 1911 (36 Stat. 1054), prescribing that appointees to the Dental Corps must be "graduates of a *standard* dental college," and the opinion of the Judge Advocate General of September 25, 1916, that certain institutions which were disqualified to confer degrees by reason of noncompliance with the laws of the State as to filing evidence as to their equipment, faculty, and other facilities for instruction, should not be recognized as *standard* colleges, additional facts were submitted showing that the particular college, since the prior decision, had complied with the requirements of the State law on the subject and been recognized by the proper State authorities as an institution having a standard course and as qualified to confer degrees in dental surgery, it further appearing that the college is one of the oldest dental schools in the world; that the failure to comply with the require-

ments of the State law was due to inadvertence; and that the equipment of the college respecting property, faculty, and other facilities for instruction, during the period preceding its recent qualification under the State law was substantially identical with its existing equipment in these respects,

Held, that if the department is satisfied that these representations respecting the equipment of the institution during the period preceding its recent recognition by the State authorities is correct, the graduates of that institution who were graduated during such period may be recognized as graduates of a standard dental college within the meaning of the act of March 3, 1911.

Ops. J. A. G. 6–227.3, May 24, 1917.

DESERTION IN TIME OF WAR: Expenses of trial; Place of trial.

Desertion in time of war being a capital offense punishable by death, or such other punishment as a court-martial may direct, and the use of depositions in such a case not being authorized except on the part of the defense,

Held, that since trials for desertion in time of war will ordinarily entail greater expense than trials for desertion in time of peace, commanding officers and all others concerned should be more than ever vigilant to see that charges for desertion in time of war are rigidly investigated and full and complete reports made with reference thereto for the information of department commanders.

Held further, that department commanders should be instructed to take into consideration the expense involved in procuring the personal attendance of witnesses, in addition to any items of expense heretofore considered, in determining whether alleged deserters in time of war shall be tried where they may be returned to military control, at the place where their commands may be serving, or whether they shall be sent to the United States Disciplinary Barracks, Fort Leavenworth, Kans., or to the Pacific branch thereof at Alcatraz, Cal., for trial.

Ops. J. A. G. 26–800, June 20, 1917.

FIELD CLERKS: Hunting leave.

In view of the department's ruling that Army field clerks and field clerks, Quartermaster Corps, are entitled to the benefits of the leave laws applicable to commissioned officers of the Army, the question was presented whether such clerks are entitled to the hunting privilege provided by Army Regulations 65 and 66.

Held, that inasmuch as the leave allowance of officers is limited by statute, the so-called hunting privilege provided by the regulations can only be justified on the ground that it produces results of a military value, and that as the reasons underlying the granting of such leave to officers who are professional soldiers do not apply to field clerks, such clerks can not legally be granted leave to hunt under the said regulations in addition to their statutory leave.

Ops. J. A. G. 2–126, June 8, 1917.

FIELD CLERKS: Purchase of subsistence supplies from Quartermaster Corps.

The question was presented whether acting Army field clerks are entitled to the privilege of purchasing food supplies from the Quartermaster's Department. The term "acting Army field clerk" is

applied to the temporary headquarter's clerks employed during the continuance of the existing emergency.

Held, that the statutes and regulations which authorize the sale of subsistence supplies to "officers and enlisted men" may properly be given a liberal application so as to include Army field clerks provided for by the act of August 29, 1916 (39 Stat. 625), inasmuch as Army field clerks are officers with a regular military status, although not commissioned officers; but as to the clerks temporarily employed and designated "acting Army field clerks," these are merely civilian employees and have no status as officers within the purview of the statutes relating to the sale of subsistence supplies to officers and enlisted men of the Army. Such acting Army field clerks may purchase subsistence supplies from the Quartermaster's Department only as civilians, under Army Regulations 1245.

Ops. J. A. G. 80–131, June 14, 1917.

INSANE OF ARMY: Appropriation for care.

On the question submitted as to whether the Surgeon General is authorized to make arrangements with private institutions for the care of insane still in the military service under the appropriations "Medical and Hospital Department," containing an item "for medical care and treatment not otherwise provided for, including care and subsistence in private hospitals, of officers and enlisted men, when entitled thereto by law, regulation, or contract," it being stated that the Government Hospital for the Insane is "taxed to its utmost capacity;" that the patients contemplated to be treated in private hospitals are those who will suffer temporary mental aberrations due to the incidents of trench warfare; that under proper conditions, if treated in psychopathic institutions where they can have the benefit of the special provisions therein made for the mentally deranged, they will be wholly restored to normal and to a duty status after a brief period of treatment; and that it is the purpose to send to the Government Hospital for the Insane those whose insanity turns out to be of a more permanent nature,

Held, that the appropriation referred to is broad enough to authorize arrangements for the treatment of insane officers and enlisted men of the Army who, because of the limited facilities of the Government Hospital for the Insane, can not properly be treated there; and that there is no legal objection to making arrangements as proposed for the treatment in private institutions of those temporarily deranged because of the conditions of service, such action being based on the inadequate facilities of the Government Hospital for the Insane to care for these patients.

Ops. J. A. G. 44–200, June 6, 1917.

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

CIVILIAN EMPLOYEES: Five and 10 per cent increase in compensation.

The provision for a 5 and 10 per cent increase of pay to civilian employees of the Military Establishment, during the fiscal year 1918, reads:

"That during the fiscal year nineteen hundred and eighteen, all civilian employees in the Military Establishment, including on the

lump-sum rolls only those persons who are carried thereon at the close of the fiscal year ending June thirtieth, nineteen hundred and seventeen, shall receive increased compensation at the rate of 10 per centum per annum to such employees who receive salaries or wages in such establishment at a rate per annum of less than $1,200, and increased compensation at a rate of five per centum per annum to such employees who receive salaries or wages in such establishment at a rate of not more than $1,800 per annum and not less than $1,200 per annum."

With reference to a similar provision affecting the Naval Establishment, the following questions relating to per diem employees were presented:

(*a*) Shall extra pay earned by overtime work be disregarded in computing 5 and 10 per cent increase of compensation, the increase being determined by crediting each eligible employee with 5 or 10 per cent, as the case may be, of his regular per diem rate for each day worked?

(*b*) If the increase of compensation is to be based upon the total pay received, including overtime work, shall the amount of pay received by any employee during a pay period be considered as bearing the same proportion to his annual pay as the number of days worked in such pay period bears to the number of working days per year?

Held as follows:

"Under the provision of this law the rate and not the *amount* of compensation is made the determining factor as to whether or at what rate the increase is to be paid, and a per annum rate is made the basis.

"A salary at the rate of $1,200 per annum is equivalent to $100 per month and $3.33⅓ per day, and a salary at the rate of $1,800 per annum is equivalent to $150 per month and $5 per day. Therefore, in determining a per diem employee's right to the increase it is these per diem rates that are to be considered and not the amount of annual compensation that he may receive at the rate paid to him.

"The number of days he may work during the year and the overtime work do not affect the question.

"If a per diem employee of the class referred to in the above-quoted law receives compensation at a rate less than $3.33⅓ per day, he will be entitled to the 10 per cent increase; for instance, if his rate of compensation is $3.30 per day, he will be entitled to an increase of 33 cents for each day's work performed, regardless of whether he may work 365 days or only 200 days during the year; likewise, if his rate of compensation is not less than $3.33⅓ per day and not more than $5 per day, he will be entitled to the 5 per cent increase; and if his rate of compensation is more than $5 per day he will not be entitled to any increase, even though the total compensation received by him during the year does not exceed $1,800.

"The increase will be allowed on overtime work as well as on regular work, provided the rate paid for overtime work on an eight-hour basis is not more than $5 per day."

Comp. Treas. May 26, 1917.

In another case the question was presented whether pieceworkers are entitled to the benefits of the said act, and, if so, upon what basis the percentage of increase should be computed.

Held, that pieceworkers are to be classed as being paid wages and that the provision for increased compensation is applicable to them upon the following basis:

"Payment is made for piecework after the doing of it, but the value of the labor in the doing of it is ascertained approximately and the compensation fixed for it before the doing of it. In fixing the compensation for the labor, certain elements must have been considered, and they become the basis of the compensation, among them being the quantity the average employee could do in a given period. On this basis a rate of compensation per day may be ascertained.

"It is understood that eight hours constitute a workday for these employees. If so, the amount of compensation earned during said period at the established piece rates is the rate of pay for the day. This rate forms the basis of computing the percentage increases. If it is less than $3.33\frac{1}{3}$, the increase will be at the rate of 10 per cent; if it is not less than $3.33\frac{1}{3}$ and not more than $5, the increase will be at the rate of 5 per cent; and if it is more than $5, no percentage increase will be paid."

Comp. Treas. May 28, 1917.

LEASE OF LANDS: Payment of rent in advance.

A lease of a tract of land by the Signal Corps for aviation purposes provided for payment of the rent in advance. The question was raised whether advance payment was not in violation of section 3648, Revised Statutes, which prohibits the advance of public money "in any case whatever." In 12 Comp. Dec. 782, it was held, in substance, that in the matter of naked lands leased to the Government, where the leased lands have been placed in the possession of the Government by the lessor, the Government has obtained all it contracts for under the lease, and hence a payment of rental at such time is not a payment in violation of section 3648, Revised Statutes. Upon reconsideration of this question,

Held, that in the case of naked lands leased by the Government it would seem that the purpose and spirit, if not the plain letter, of the law are against payment of the rent in advance, and that therefore the decision in 12 Comp. Dec., 782, is modified so that hereafter "payment of rent in advance by the month, year, or quarter for naked lands leased to the Government will not be recognized by the accounting officers."

Comp. Treas. May 23, 1917.

NATIONAL GUARD: Pay of enlisted men refusing to take Federal oath.

Where an enlisted man of the Organized Militia called out in the national defense refused to take the Federal enlistment oath prescribed in the act of June 3, 1916, or to be formally mustered into the Federal service, but who was treated in all respects as a member of the organization in that service and was required to perform all the duties of a soldier from the date of his enlistment to the date of his muster out,

Held, that he was entitled to pay as a member of the organization during the period referred to.

Comp. Treas. May 12, 1917.

PAY OF ENLISTED MEN: Foreign-service increase.

The question was presented whether in the case of enlisted men the 20 per cent increase for foreign service provided for by the act of June 30, 1902 (32 Stat. 512), is to be computed on the monthly increase of pay authorized by the act of May 18, 1917. The act of 1902 authorizes the payment to enlisted men of 20 per cent increase for foreign service, such increase to be "over and above the rates of pay proper as fixed by law for *time of peace*"; and the act of May 18, 1917, provides that the monthly increases therein authorized are to continue *only until the termination of the emergency.*

Held, that as the rates of pay "as fixed by law for time of peace" do not include monthly increases provided for by the act of May 18. 1917, which are war increases, such monthly increases can not enter into the computation of the 20 per cent increase provided for foreign service.

Comp. Treas. May 29, 1917.

PRIVATE PROPERTY: Claim for loss in military service.

In connection with a recent claim of an officer of the Army for the loss of private property in the military service the Comptroller of the Treasury placed upon the act of March 3, 1885 (23 Stat. 350), a construction which materially restricts the operation of the act in comparison with the practice under decisions heretofore in effect. The act provides for the settlement under conditions therein prescribed for the loss, "except in time of war or hostilities with Indians," of private property of officers and enlisted men under the following circumstances:

"First. When such loss or destruction was without fault or negligence on the part of the claimant.

"Second. Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment.

"Third. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances."

Held, by the comptroller, that when a claim of an officer or enlisted man of the Army for the value of his private property lost or destroyed in the military service is presented within two years from the occurrence of the loss or destruction, and it appears that the loss or destruction was not "sustained in time of war or hostilities with Indians," and "was without fault or negligence on the part of the claimant," said act of March 3, 1885, provides for payment under two and only two circumstances, namely:

1. "Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of an officer authorized to give such order or direct shipment.

2. "Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances."

This construction is a return to an early construction of the act announced by the Second Comptroller of the Treasury under date of November 8, 1893, and is based upon an examination by the comptroller of the legislative history of the statute which was resorted to in view of the ambiguity of the statute, as evidenced "by the fact that the comptrollers who held office for 30 years after the law passed reached many different conclusions as to its meaning."

Comp. Treas. May 7, 1917.

TRANSPORTATION: Officers' baggage allowances.

Where a captain of the Philippine Scouts was retired with the pay and allowances of a master signal electrician of the Army, as provided by section 26 of the national-defense act of June 3, 1916:

Held, that he was entitled to the transportation, from his last duty station to his home, of the baggage allowance of a captain, as provided by Army Regulations 1136 and 1137.

Comp. Treas. June 6, 1917.

BULLETIN 49.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CAMPAIGN BADGES: Issue of, to members of training camps.

A candidate for a commission while serving in the reserve officers' training camp applied for a campaign badge for service rendered during the Philippine insurrection. Upon the question whether members of training camps are in the military service in such manner as would justify the issuance of campaign badges,

Held, that since members of training camps are enlisted in the service of the United States, though only for a term of three months, they are members of the military force of the United States, and that campaign badges, being authorized as a part of the uniform, could properly be issued to them as a part of the uniform which they are entitled to wear in the service of the United States.

Ops. J. A. G. 46–321, June 30, 1917.

CLAIMS FOR PRIVATE PROPERTY: Commencement of war.

Upon the question raised as to the " date of commencement of the present war " with reference to the action which should be taken on claims of officers and enlisted men for property destroyed in the military service under the act of Congress approved March 3, 1885, providing that the act " shall not apply to losses sustained in time of war or hostilities with Indians,"

Held, that the date of the commencement of the present war should be regarded as the date of approval of the joint resolution of Congress of April 6, 1917 (Pub. No. 1, 65th Cong.), formally declaring a state of war as existing between the United States and the Imperial German Government.

Ops. J. A. G. 18–461, June 30, 1917.

CONTRACTORS: Relief on the ground of hardship.

The question was submitted as to whether or not the decision of the comptroller, dated May 24, 1917, construing the contract of F. H. Leggett & Co. for the delivery of flour to the Marine Barracks, Port Royal, S. C., is applicable to similar contracts of the Quartermaster Corps for fuel, forage, etc. The decision of the comptroller, after citing the provisions of the contract requiring the contractor to furnish, at the stipulated price, such quantities of flour "*as may be required*" during the period specified, and showing that the estimated quantity was based simply on "normal conditions," and that it was contemplated that the "quantity stated will be increased or diminished as the necessities * * * may demand," held that the fact that the market price of flour has materially advanced, and that the quantity of flour required to meet the needs of the service is largely in excess of that required under normal peace conditions, do not furnish any legal basis for relieving the contractor of his obligation to furnish all the flour required at that post. The decision of the comptroller is in line with the decision of the Court of Claims in

the case of *Carstens Packing Co.* v. *United States*, decided May 28, 1917, a digest of which decision appears on page 17 of Bulletin 34, dated June 8, 1917 (ante p. 25). Upon the question submitted.

Held, that the decision of the comptroller and the decision of the Court of Claims in the cases referred to above should be applied by disbursing officers to contracts of the Quartermaster Corps for fuel, forage, etc., where the terms are substantially the same and the circumstances are similar; and that if the facts and circumstances of the particular case appear to make these decisions inapplicable, the matter should be submitted to the department for consideration.

Ops. J. A. G. 76–700, July 13, 1917.

ENLISTMENTS: Continued in force during war.

Upon questions (*a*) whether soldiers could legally be discharged by reason of expiration of term of enlistment subsequent to the passage of the act of May 18, 1917, and (*b*) whether that act was effective to continue in force enlistments in the National Guard,

Held, that question (*a*) must be answered in the negative since the provision contained in section 7 of the act of May 18, 1917, reading:

"All enlistments, including those in the Regular Army Reserve, which are in force on the date of the approval of this act and which would terminate during the emergency, shall continue in force during the emergency unless sooner discharged; but nothing herein contained shall be construed to shorten the period of any existing enlistment."

is an inhibition against discharges unless ordered by the Secretary of War under his general power to grant discharges in the interest of the Government, and since the soldier's enlistment is prolonged for the period of the emergency by the provision quoted, a discharge for the purpose of immediate enlistment would involve administrative labor and a multiplication of records without any resultant benefit to the Government.

Held further as to question (*b*), that since the provision quoted is applicable to "all enlistments," it is applicable to enlistments in the National Guard, they being enlistments in the National Guard of the United States as well as the National Guard of a State; and the question is answered in the affirmative.

Ops. J. A. G. 28–240, June 2, 18, 1917.

NATIONAL GUARD: De facto property and disbursing officer.

In the case of an administrative staff officer who, not being an officer of the National Guard, was ineligible for appointment as property and disbursing officer under section 67, national-defense act of June 3, 1916, upon his application for action by way of confirmation of his official act as property and disbursing officer,

Held, that no confirmation in his case would be required; that the acts of the officer as the *de facto* incumbent of the office must be regarded as valid (29 Cyc. 1389, etc.; 8th A. and E. Encyc. of Law, 806) and that as there was no *de jure* claimant to the office for the time under consideration, the officer would be entitled to retain the salary paid to him while the *de facto* incumbent of the office.

Ops. J. A. G. 58–213, June 28, 1917.

NATIONAL GUARD: Final statements.

In the case of an enlisted man of the Texas engineers who, without a discharge from that organization but prior to the muster into the Federal service of that organization, enlisted in the National Guard of another State, and after his arrival in Texas was apprehended, tried, and sentenced for fraudulent enlistment, and subsequently was released on probation and furnished transportation to his home in Texas; on the question as to the date from which final statements should be made out for the Texas organization,

Held, that the date he was apprehended and taken into military custody—November 16, 1916—should be the date from which he should be given final statements with respect to his service in the Texas organization.

Ops. J. A. G. 72–200, July 10, 1917.

NATIONAL GUARD: Reenlistments of noncommissioned officers.

In the case of a corporal of a National Guard organization who, with others, was mustered out of the Federal service April 13, 1917, because of refusal to subscribe to the oath prescribed by the national-defense act of June 3, 1916, and who applied June 5, 1917, for reenlistment, and upon signing the dual oath was restored to duty; on the question whether he should be carried as and receive the pay of a corporal or a private, it being stated that the company has its full complement of noncommissioned officers, appointed since the muster out of a portion of the company,

Held, that he is to be regarded as having reenlisted June 5, 1917, and that, as there is no vacancy in his company as corporal, he must be carried as and receive the pay of a private.

Ops. 6–151.1, June 23, 1917.

OFFICERS: Transfer under provisions of section 25 of the national-defense act.

Upon the question whether an officer transferred to another arm under the provisions of section 25 of the national-defense act subsequent to May 15, 1917, would be given a place on the lineal list of that arm determined by his relative rank on the passage of the bill June 3, 1916, or determined by his relative rank at the date of his actual transfer,

Held, that the purpose of the fifth proviso of section 25 of the national-defense act, reading:

"That for the purpose of lessening as much as possible inequalities of promotion due to the increase in the number of officers of the line of the Army under the provisions of this act, any vacancies created or caused by this act in commissioned grades below that of lieutenant colonel in any arm of said line may, in the discretion of the President and under such regulations as he may prescribe in furtherance of the purpose stated in this proviso, be filled by the promotion or transfer without promotion of officers of other branches of the line of the Army; * * *"

is limited to lessening inequalities of promotion due to the increase in the number of officers of the line of the Army under the provisions of the national-defense act; that the only inequalities of promotion which could result from the addition of officers would be inequali-

ties between arms, and not inequalities between individuals within either of the arms; that the purpose of the statute, therefore, is to authorize transfer from the arm receiving the smaller increase to the arm receiving the larger increase, thus increasing the promotion in one arm and at the same time decreasing it in the other, and so producing an equality or a nearer approach thereto. Therefore, the statute does not address itself to equalizing or benefiting the persons transferred. Equity dictates, however, that the regulations made by the President for such transfer shall be equity to officers transferred. This has been done by prescribing that the officer transferred shall retain his relative rank at the date of the transfer. The increases authorized by the national-defense act were by the act itself divided into increments, and it is but a logical conclusion that each increment should constitute a separate and distinct addition to the Regular Army, except when two or more are added at the same time as has been those on May 15, 1917. When the first increment was added, certain vacancies which were thereby caused or created on July 1, 1916, were reserved for officers who were to be transferred when their eligibility should be determined. There was, therefore, nothing in the way of assigning to those officers when transferred constructive dates of transfer corresponding with the vacancies which existed on the dates constructively adopted and were reserved for those officers. All vacancies to which transfers might be made which were created or caused by the first increment have now been filled, and there are therefore no vacancies created or caused by that increment to which the transfer of an officer can relate back in fixing a constructive date of transfer. Therefore, officers now transferred to another arm under the proviso quoted must take the relative rank which they had when the vacancies to which they are transferred occurred, there being no authority of law for disturbing, in order to benefit officers transferred to vacancies created by other increments, the relative rank established by the completion of the first increment. A disturbance of the relative rank established by the completion of the first increment would not lessen the inequalities of promotion due to the increase in the number of officers of the line of the Army as defined above, and therefore would not come within the purpose or authority of the national-defense act.

Ops. J. A. G. 82–200, May 23, 1917.

RATION SAVINGS: Expenditure of.

A detachment of soldiers kept a cow for the production of milk for the detachment mess, and the question was presented whether it was legal to purchase feed for the cow from the ration savings in view of the requirement of paragraph 1220, Army Regulations, that "such savings shall be used solely for the purchase of articles of food."

Held, that the purpose of the regulation being simply to require that funds appropriated by Congress for the subsistence of soldiers shall be used for no other purpose, either directly or indirectly, the expenditure of ration savings for feed for the cow under the circumstances would not be in violation of the regulation, such expenditure resulting in the procurement of milk for the soldiers.

Ops. J. A. G. 40–211, June 30, 1917.

RESERVE OFFICERS' TRAINING CORPS: Commutation of subsistence.

Upon the question as to whether in case the exigencies of the service require the relief of the professor of military science and tactics at an institution at which one or more units of the senior division of the Reserve Officers' Training Corps have been established, leaving on duty only enlisted men detailed under section 46 of the national-defense act, in the absence of a commissioned officer can the "military training prescribed by the Secretary of War" under section 50 of the national defense act of June 3, 1916, be so carried on as to entitle the members of the senior division at the institution, who have complied with all requirevents so far as they are concerned to be paid the commutation of subsistence provided by said section 50.

Held, that the presence of an officer of the Army, active or retired, as professor of military science and tactics is a condition for the maintenance of a unit of the training corps under instruction at the particular institution; and that, in the absence of such instruction, the "military training prescribed by the Secretary of War," as contemplated by the national defense act, can not be carried on so as to entitle the members of the senior division of such training corps to be paid the commutation of subsistence provided by section 50 of said act.

Ops. J. A. G. 56–400, July 2, 1917.

VETERINARY SURGEONS: Age qualifications for appointment.

The question was presented whether the provision of the act of May 12, 1917 (Army appropriation act), amending section 24 of the national-defense act, so as to provide new age limits for appointments to the grade of second lieutenant, affected the eligibility for appointment as assistant veterinarians under section 16 of the national-defense act.

Held, that, since the provision of section 16 of the national-defense act governing the eligibility of persons for appointment as assistant veterinarians is not dependent upon or affected by the provisions governing the eligibility for appointment as second lieutenant found in section 24 of that act, the amendment of section 24 by the act of May 12, 1917, does not affect the provision relative to appointments as assistant veterinarians found in section 16 of the national defense act.

Ops. J. A. G. 64–261, June 23, 1917.

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

CIVILIAN EMPLOYEES: Compensation.

With reference to the provisions in the various annual appropriation acts for the fiscal years 1918 for 5 and 10 per cent increases in compensation of civilian employees,

Held, that persons employed by the Government from day to day, or to do a particular job, or whose compensation is not fixed by law or regulation, but by agreement at the time when the services are engaged, are not entitled to the percentage increases of compensation under the statutes referred to, such persons not being employees of the United States within the meaning of such statutes.

Comp. Treas. June 28, 1917.

CIVILIAN EMPLOYEES: Medical and hospital treatment.

Section 9 of the injured-employees' compensation act of September 7, 1916 (39 Stat. 743), provides:

"That immediately after an injury sustained by an employee while in the performance of his duty, whether or not disability has arisen, and for a reasonable time thereafter, the United States shall furnish to such employee reasonable medical, surgical, and hospital services and supplies unless he refuses to accept them. Such services and supplies shall be furnished by the United States medical officers and hospitals, but where this is not practicable shall be furnished by private physicians and hospitals designated or approved by the commission and paid for from the employees' compensation fund. If necessary for the securing of proper medical, surgical, and hospital treatment, the employee, in the discretion of the commission, may be furnished transportation at the expense of the employees' compensation fund."

Held, that under this act United States hospitals and facilities are free to injured employees of any department of the Government, and that the appropriations for the various executive departments or other Government establishments or services may not lawfully be reimbursed from the compensation fund provided for injured Government employees for the cost of medical or hospital treatment of such employees unless such treatment was furnished by private physicians or hospitals at the cost of the executive department, establishment, or service seeking reimbursement.

Comp. Treas. June 27, 1917.

CIVILIAN EMPLOYEES: Pay while attending reserve officers' training camps.

Held, that an employee of the United States on leave of absence and attending an officers' training camp as a candidate for a commission in the Officers' Reserve Corps of the Army may not lawfully receive his regular compensation as a civilian employee for such period in addition to pay as such candidate when the annual rate of the combined compensation so received exceeds $2,000, in view of the act of August 29, 1916 (39 Stat. 582), amending section 6, act of May 10, 1916; *and further*, that he can not elect to refuse his military pay in order to accept the pay of his civil position.

Comp. Treas. June 25, 1917.

FIELD CLERKS: Compensation.

The question was presented whether Army field clerks and field clerks, Quartermaster Corps, are entitled to the benefits of the provision in the Army appropriation act, approved May 12, 1917, for 5 and 10 per cent increases in the compensation of "all civilian employees in the Military Establishment."

Held, that Army field clerks and field clerks, Quartermaster Corps, not being regarded as civilian employees, they are not entitled to the benefits of the statute mentioned.

Comp. Treas. June 14 and 27, 1917.

OFFICERS' RESERVE CORPS: Mileage.

Upon the question whether officers of the Officers' Reserve Corps of the Army are entitled to mileage for travel in joining their first duty station under War Department orders,

Held, that the provision in section 38, national defense act of June 3, 1916, that members of the Officers' Reserve Corps "shall be entitled to the pay and allowances of the corresponding grades in the Regular Army * * * from the date upon which they shall be required by the terms of their orders to obey the same," clearly entitles such officers to mileage for the travel performed, mileage being an allowance.

Comp. Treas. June 6, 1917.

RETIRED OFFICERS: Longevity increases for active duty.

The act of May 12, 1917 (Pub. No. 11, p. 10), provides:

"That hereafter any retired officer of the Army who has been detailed to active duty, and who has since his retirement served on active detail, shall be entitled to increases of longevity pay to be computed as provided by existing statute for the computation of longevity pay, for the time of his service before retirement and on active detail since his retirement."

Held, that under this legislation, which is to be read in connection with the last proviso of section 24, national defense act of June 3, 1916, retired officers coming within its operation are entitled to increases of longevity pay, on account of active service rendered since retirement, not only while on such active duty but also after they have been relieved from such duty.

Held further, that the act in question deals also with allowance of longevity credit for all active service rendered by such officers since retirement, including any such service rendered before the passage of the act of May 12, 1917.

Comp. Treas. June 7, 1917.

TRAVEL PAY: Enlisted man discharged with view to acceptance of commission.

An enlisted man of the National Guard was discharged with a view to his acceptance of a commission, but he failed to qualify physically for the commission. Upon the question whether he was entitled to travel pay as a discharged enlisted man,

Held, that the soldier's discharge as an enlisted man to enable him to accept a commission, which he failed to obtain by reason of physical disqualification, was a discharge from the service within the law authorizing travel pay to enlisted men upon their discharge from the service; but *contra* if he had succeeded in being immediately mustered in in the same regiment as an officer—in such event he would not have been "discharged from the service" within the meaning of the travel-pay law, but would have been continued in the service in a higher grade.

Comp. Treas. July 25, 1917.

TRAVEL PAY: Enlisted men on discharge.

An enlisted man was arrested and tried by the civil authorities on a charge of burglary. His trial resulted in conviction, but the sentence was supended and the soldier returned to the military authorities. About a month thereafter he was discharged by order of the department commander because "convicted by a civil court of the crime of burglary." The question was presented whether he was entitled to travel pay upon his discharge. Section 126, national defense act of June 3, 1916, declares that enlisted men when dis-

charged from the service, "except by way of punishment for an offense," shall be entitled to the travel allowances therein provided.

Held, that upon the discharge of a soldier he is entitled to travel pay unless his discharge was (*a*) by way of punishment for an offense, (*b*) by way of favor or for his own convenience, or (*c*) he was withdrawn from the military service by the civil authorities, and that in the instant case the soldier must be regarded as having by his own conduct created the conditions which caused his separation from the military service under (*c*), and that he was therefore not entitled to travel pay upon his discharge.

Comp. Treas. July 23, 1917.

NOTES ON ADMINISTRATION OF MILITARY JUSTICE.

SENTENCES: Adequacy of.

A soldier was found guilty of being drunk and quitting his post in time of war while on sentry duty guarding a bridge. The appointing authority approved, without comment thereon, the sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for one month. The action of the court and the reviewing authority in this particular case is not criticized, but, as a general rule, a sentence combining dishonorable discharge and a short period of confinement is inappropriate, particularly at the present time, because of the resulting tendency to encourage a certain class of men to commit offenses in the hope of being discharged from the military service.

BULLETIN 54.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY FIELD CLERKS: Service necessary to qualify for allowances.

An Army field clerk inquired whether he was entitled to credit for prior service as clerk in the Quartermaster Corps and in the Signal Corps for the purpose of making up 12 years of service under the act of August 29, 1916, which changed headquarters' clerks to Army field clerks, and provides that "after 12 years' service," as therein prescribed, they shall receive the same allowances, except retirement, "as heretofore allowed by law to pay clerks, Quartermaster Corps."

Held, that as the governing statute relates only to headquarters clerks changed to Army field clerks, and there is nothing in it to suggest a different purpose, it must be held that the phrase "after 12 years' service" refers only to service as headquarters clerk or as Army field clerk; and that in the instant case the field clerk was not entitled to count his prior service as clerk in the Quartermaster Corps and Signal Corps.

Ops. J. A. G. 6–135, July 24, 1917.

ARMY SUPPLIES: Import duties.

On the question whether Army supplies purchased in Canada (woolen blankets and clothing) are admissible free of duty.

Held, that the customs act in force, as construed by the officers administering the same, requires all imports to pay the prescribed duties; that they are only admitted duty free where some Federal statute authorizes such admission; and that as to the supplies under consideration, there being no statute providing for their admission free of duty, the required duties must be paid, although the supplies are consigned to the proper officers of the Quartermaster Corps; and that if it is desired that such supplies be admitted free of duty, express legislation must be procured for that purpose.

Ops. J. A. G. 90–313, Aug. 10, 1917.

ARTICLES OF WAR: Construction of the forty-fifth article.

The forty-fifth Article of War provides:

"Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe."

In certain cases tried by general court-martial in which the offense was committed in time of peace but not brought to trial until after war had begun, the records disclosed that the courts-martial proceeded upon the assumption that the intervention of a state of war had rendered the maximum punishment order no longer operative

as to all cases tried during the state of war irrespective of the time of the commission of the offenses.

Held, that this view of the effect of the forty-fifth article of war is erroneous; that while a liberal rendering of the article might indicate that the time at which an offense is *tried*, and not the time of the commission of the offense, is to determine the measure of punishment, such a result was clearly not the intention of Congress, but under the well-known rule of construction that the spirit and not the letter of the law must prevail it must be held that the proper construction of the forty-fifth article of war is to the effect that the maximum punishment order is applicable and must govern in the punishment of all offenses committed in time of peace regardless of the date when such offenses may be tried, and that as to all offenses committed in time of war the maximum punishment order will not apply whether the said offenses be tried during time of war or not until time of peace.

Ops. J. A. G. 30–823, Aug. 29, 1917.

CIVILIAN TRAINING CAMPS: Claims for damages.

On the question whether claims for damages to private property due to training-camp work are payable from training-camp funds when duly found by the proceedings of a board of officers, approved by the commanding officer.

Held, that the appropriation for civilian training camps (act of May 12, 1917; Pub. No. 11, 65th Cong. p. 34) expressly includes "damages resulting from field exercises and other expenses incident to maintaining said camps," etc.; and that this provision clearly covers damages to private property due to operations incident to training-camp work.

Ops. J. A. G. 18–420, July 23, 1917.

COURTS-MARTIAL: Legality of sentence.

An enlisted man of an Engineer detachment was sentenced by summary court-martial to be reduced from corporal to private. As there was no grade of private in the detachment, the question was presented whether the sentence was legal.

Held, that as there is a grade of private of Engineers, and as a summary court-martial has jurisdiction to reduce noncommissioned officers to the ranks, the fact that in the particular detachment there was no grade of private did not affect the power of the court, and that the sentence was legal if there was no other objection.

Ops. J. A. G. 30–704, Aug. 22, 1917.

EIGHT-HOUR LAW: Contracts for supplies.

The question was submitted as to whether the eight-hour act of June 19, 1912 (37 Stat. 137), applies to operations upon an order placed with a manufacturer for panoramic sights for the Ordnance Department, it being stated that the Government has never manufactured such sights other than as a laboratory experiment,

Held, that while the prospective buyers of such supplies are limited to governments or their agencies, they are, nevertheless, within the provision of the statute excepting from the operation of the act supplies or materials which may usually be bought in

open market; that the exception applies, although the class of purchases is so limited, is indicated by the fact that there is withdrawn from the exception "armor and armor plate," a class of articles the market for which is similarly limited.

Ops. J. A. G. 32–313, Aug. 10, 1917.

ENLISTED MEN: Extra and special duty.

The question was presented whether extra compensation is payable to enlisted men under paragraph 329, Army Regulations, from company and mess funds for services as cooks, mess attendants, etc., in view of War Department order of June 6, 1917, that "no extra-duty pay will be allowed" to enlisted men during the time for which they will receive increased compensation under the act of May 18, 1917.

Held, that the War Department order of June 6, 1917, which applies only to *extra-duty* pay does not prohibit the allowance of additional pay to enlisted men from company and mess funds under A. R. 329, which additional pay is for *special duty* and not extra duty. The distinction between extra and special duty is well established. Extra duty has relation to constant labor extending over a period of not less than 10 days, *not* connected with the interior administration of a company, regiment, or other organization, for which service compensation in the form of extra-duty pay has been allowed by law. The term *special duty* applies to service connected with the administration of companies, battalions, regiments, etc., or with the comfort and welfare of enlisted men belonging to such organizations. It is a duty which belongs to the organization—to the enlisted men of the company or regiment and not to the public.

Ops. J. A. G. 72–203, Aug. 28, 1917.

ENLISTED RESERVE CORPS: Aviation pay.

The question was submitted whether enlisted men of the Aviation Section, Signal Enlisted Reserve Corps, are entitled to increased pay when on duty requiring them to participate regularly and frequently in aerial flights,

Held, that they are so entitled, under the same conditions as are enlisted men of the Regular Army on such duty, for the reason that section 3 of the act of July 18, 1914 (38 Stat. 514), creating the Aviation Section of the Signal Corps and prescribing the personnel, provides that each aviation enlisted man shall receive additional pay when on such duty; and section 13, national defense act, only repeals inconsistent provisions of the prior law, leaving this provision in force; and section 55, national defense act, provides that members of the Enlisted Reserve Corps, when in active service, "shall be entitled to the pay and allowances of the corresponding grades of the Regular Army," etc.

Ops. J. A. G. 72–200.1, July 16, 1917.

INTOXICATING LIQUORS: Military camps.

With reference to a recommendation that Tampa, Fla., where certain troops were assembled preliminary to their transfer to a division training camp, be declared a military post in order to require the closing of all saloons during the presence of the soldiers there,

Held, that the term "military camps," as used in the act of May 18, 1917, and the regulations made under authority thereof governing the prohibition of alcoholic liquors "in or near military camps," had reference to camps established for purposes of mobilization, training, embarkation, etc., of troops and were not intended to apply to places of preliminary assembly such as that under consideration.

Ops. J. A. G. 48–100, Aug. 25, 1917.

MEDICAL DEPARTMENT: Treatment of contractors' employees on cantonment construction.

On the question whether there was any objection to the treatment by the Medical Department of the employees of contractors for buildings at cantonments,

Held, that while the functions of the Medical Department are not defined by statute, they are necessarily limited by the terms of appropriations for the support of the Army; that the appropriations for the Medical Department appear to be available only for the medical care and treatment of persons connected with the military establishment and, under authority of the act of September 7, 1916 (39 Stat. 748), of Government employees generally who are injured in the performance of their duty as such employees; and that while the medical care of contractors' employees may be authorized from appropriations for cantonment construction, the limitations on the use of Army appropriations would preclude payments from such appropriations of the necessary expenditures involved.

Ops. J. A. G. 6–227.6, Aug. 18, 1917.

NATIONAL GUARD: Pay and medical treatment of members prior to muster into Federal service.

A National Guard enlisted man who had responded to the President's call for Federal service but had not been mustered in suffered a broken leg in a friendly scuffle with other enlisted men of his company. There being no Government facilities available for his treatment, he was sent to a private hospital by order of his commanding officer, where he remained for several weeks and was not able thereafter to report to his organization for duty before its muster out. It was not clear from the record whether the soldier had been formally rejected as unfit for the Federal service. Upon submission of the question as to his right to pay and the liability of the Government for the expenses of his hospital treatment,

Held, That in view of the nature of the soldier's disability, his rejection as being physically unfit for the Federal service was necessarily implied, assuming that he was not formally rejected, effective on such date as it would have been his duty but for his injuries to report for muster in, and that he was entitled to pay only up to that date; and as to the obligation of the United States to pay the expenses of his medical and hospital treatment, his status after the date of his implied rejection for physical disability was analogous to the case of a soldier discharged from the service while confined in a hospital for treatment, who, under the provisions of paragraph 1452, Army Regulations, would be entitled to remain in the hospital at the expense of the United States until such time only as he was able to leave the hospital and proceed to his home.

Ops. J. A. G. 6–227.6, July 27, 1917.

PAY AND ALLOWANCES: Fuel and light for Reserve and National Guard officers.

In the case of certain members of the Officers' Reserve Corps and officers of the National Guard on duty at a military post, the question was raised as to the legality of their being charged by the Quartermaster Corps for fuel and light consumed by them in public quarters.

Held, that Congress has very clearly manifested its intention in legislation that National Guard troops and members of the Officers' Reserve Corps in the active service of the United States shall receive the same pay and *allowances* as is provided by law for officers and enlisted men of the Regular Army of like grades, and that under the act of March 2, 1907 (34 Stat. 1167), all officers are entitled to heat and light actually necessary for the allowance of quarters to which they are entitled and have been assigned, and in case National Guard officers and members of the Officers' Reserve Corps on duty at any military post are duly occupying their authorized allowance of public quarters at such post, they should not be charged for heat and light actually necessary for such quarters.

Ops. J. A. G. 72–310, Aug. 18, 1917.

RETIRED ENLISTED MEN: Active duty pay.

It was directed in War Department orders that certain retired enlisted men named therein "are assigned to active duty in their grades, to take effect June 20, 1917, and will be sent by the commanding general of the department in which the soldiers reside to the stations indicated for assignment to active duty." The men were not directed by the department commander to report for active duty until some time after June 20, 1917, and the question was presented whether they were entitled to active duty pay from June 20, the date named in War Department orders as the date of their assignment to active duty. Section 7 of the act of May 18, 1917, provides that the President may "authorize the employment on any active duty of retired enlisted men of the Regular Army, either with their rank on the retired list or in the higher enlisted grades, and such retired enlisted men shall receive the full pay and allowances of the grades in which they are actively employed.

Held, that the statute indicates clearly that the soldiers must be *employed* on active duty before full pay and allowances can accrue; that the War Department order in such cases is to be regarded only as authority for employment of the men on active duty and does not have the effect of authorizing pay from the date mentioned therein, and that under the statute active duty pay does not commence until the men start in response to specific orders to report for duty.

Ops. J. A. G. 88–630, Aug. 14, 1917.

RETIRED OFFICERS: Commencement of pay for active service.

Section 24, national defense act of June 3, 1916, provides:

"That in time of war retired officers of the Army may be employed on active duty, in the discretion of the President, and when so employed they shall receive the full pay and allowances of their grade."

Held, that as retired officers ordered to active duty under this stat-

ute are entitled to active duty pay only when "employed on active duty," full pay and allowances do not begin to accrue until the officer starts to obey his orders placing him on active duty.

Ops. J. A. G. 88–630, Aug. 14, 1917.

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

CIVILIAN EMPLOYEES: Compensation increases.

The following question was presented for decision:

"A civilian employee being in the service prior to June 30, 1917, in the capacity of laborer is dropped on July 5, 1917, as such, and reemployed on July 6 as packer. Is he entitled to the 10 per cent increase in pay under the act making appropriations for the support of the Army for the fiscal year ending June 30, 1918, and for other purposes, and upon what is it based?"

Held, that if the employee in question is a civilian employee in the Military Establishment and was borne on a lump-sum roll on June 30, 1917, he is entitled to the percentage increase, *on his compensation as packer*, provided the position or rating of packer existed or was recognized at the close of the fiscal year 1917 and the rate of compensation thereof does not exceed $1,800 per annum or $5 per day; but if the position or rating of packer is a newly established one not recognized during the fiscal year 1917, the employee receiving such rating is entitled only to the compensation fixed therefor without any percentage increase.

Comp. Treas. Aug. 7, 1917.

CIVILIAN EMPLOYEES: Percentage increase in compensation.

Certain employees of the Military Establishment who were in the service June 30, 1917, and borne on lump-sum rolls were thereafter promoted to other positions in the military service also payable from lump-sum appropriations. As to whether they were entitled to the percentage increases provided for in the Army appropriation act approved May 12, 1917, on the salaries of the positions to which they were promoted,

Held, that if the positions or rating to which they were promoted existed or were recognized in the Military Establishment at the close of the fiscal year 1917, such employees were entitled to the percentage increases.

Comp. Treas. Aug. 27, 1917.

COMMUTATION OF QUARTERS: Officers on duty in the field.

In the case of certain National Guard organizations called into the Federal service and ordered to do guard duty along railroads, at public buildings, etc., the question was presented whether such officers were entitled to commutation of quarters in view of the fact that it was "not possible to establish a camp," and, further, that no tentage was available, and when "ordered from home stations to go on guard duty at bridges and public buildings the various corporations interested had to furnish shelter" for the men, and the officers had to make their own provisions for quarters. The act of March 4, 1915, provides:

"That hereafter, at places where there are no public quarters available, commutation for the authorized allowance therefor shall be paid to commissioned officers. * * *."

The act of February 27, 1893 (27 Stat. 480), provides that "officers temporarily absent on duty in the field shall not lose their right to quarters or commutation thereof at their permanent stations while so temporarily absent."

Held, that the officers referred to were not entitled to commutation of quarters for the following reasons:

It has long been the well-established rule that officers on field service do not acquire a right to commutation of quarters while on and by reason of such service.

The said officers were on duty in the field, and under their orders had no station other than their field station, and so could not be temporarily absent from a permanent station within the act of February 27, 1893, which act does not give an officer commutation of quarters for duty in the field, but secures to him his right to commutation of quarters as for service at his permanent station. If the officers failed to receive an allowance of tentage and camp equipage, it was an incident of the service, and there is no authority for giving them a money allowance.

Comp. Treas. Aug. 8, 1917.

NATIONAL GUARD: Pay of enlisted men for training service.

Certain enlisted men of the District of Columbia National Guard, not in the Federal service, were engaged in outdoor rifle practice under competent orders during the month of June, 1917.

Held, that they were entitled for such service to the increased rates of pay provided for by section 10 of the act of May 18, 1917.

Comp. Treas. Aug. 3, 1917.

PRIVATE PROPERTY: Loss in shipment under orders.

The Auditor for the War Department disallowed the claim of a noncommissioned officer for the value of his household goods destroyed by fire June 30, 1916, at Seattle, Wash., while in shipment under orders, such disallowance being made for reasons stated as follows:

"As the property was not lost or destroyed by being shipped on an unseaworthy vessel, nor by reason of the claimant giving his attention to saving property belonging to the United States, no reimbursement can be made."

Upon appeal,

Held, by the Comptroller, that the claimant was entitled to reimbursement under the act of March 4, 1915, which extends the provisions of the act of March 3, 1885, to cover losses of private property sustained in shipment under orders in excess of that recoverable from the carrier. This legislation authorizes and directs the accounting officers of the Treasury to examine into, ascertain, and determine the value of the regulation allowance of baggage belonging to officers and enlisted men in the military service which has been lost or damaged in such service on or after March 4, 1915, in shipment under orders; and when such loss or damage was without fault or negligence on the part of the claimant, was not sustained in time of war or hostilities with Indians, and the claim for compensation is pre-

sented within two years from the occurrence of the loss or damage, the amount of such loss or damage so ascertained, in excess of the amount recoverable from the carrier, is payable by the United States. The liability of the Government is, by the terms of the act of 1885, "limited to such articles of personal property as the Secretary of War, in his discretion, shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty."

Comp. Treas. Aug. 1, 1917.

NOTES ON MILITARY JUSTICE.

EVIDENCE: Depositions.

Under the twenty-fifth article of war the use of depositions in capital cases is prohibited. Under the fifty-eighth article of war the death penalty may be imposed for desertion in time of war. Depositions are, therefore, not admissable as evidence in desertion cases in time of war. The fact that under the thirty-seventh article of war the improper admission of evidence does not wholly invalidate the proceedings, if the substantial rights of the accused have not been injuriously affected thereby, does not authorize the use of depositions in desertion cases in time of war.

SENTENCES: Forfeiture of pay.

A number of sentences have recently been noticed in which long terms of confinment were imposed without any forfeiture or detention of pay. In addition to the general and obvious objections to paying a soldier serving sentence for the performance of duty, which because of his misbehavior has been thrust upon his better-behaved comrades, there is the further consideration, which is of particular importance whenever duty is as arduous as it was in several of the instances noticed, that these sentences have a tendency to encourage rather than to deter the commission of offenses by a certain percentage of men. It is only in very exceptional cases that such sentences should be considered appropriate.

BULLETIN 67.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY I, E; ARMY BANDS I: Competition of enlisted men with civilians.

By the act of May 11, 1908 (35 Stat. 110), and the act of June 3, 1916 (39 Stat. 175), enlisted men, Army bands, and members thereof are forbidden from engaging in any competitive civilian employment. The implication is that they may engage in such employment if it does not interfere with the customary and regular engagement of local civilians in the respective arts, trades, or professions. Whether such interference will or does result is a question of fact, which is not to be settled by reference either to union labor alone or to nonunion labor alone.

Ops. J. A. G. 322.941, Oct. 25, 1917.

ARMY I: Composition and organization.

There is but one Army of the United States, and every organization, bureau, officer, and man in the military service is part of it. The Inspector General's Department, as well as all other staff corps and departments, are to be reorganized out of the Army at large so that such departments may properly perform their ever-increasing functions. The primary authority for providing the necessary staff officers in the increased establishment is not to be found in the use of reserve officers as such, but in the power to appoint necessary officers under the National Army act.

Ops. J. A. G. 6–220, Oct. 16, 1917.

The President may organize the National Guard component of the Army of the United States largely as he sees fit under section 111 of the national defense act.

Ops. J. A. G. 58–210, Sept. 26, 1917.

ARMY II, D: Employment of, to aid civil authority.

By section 4, Article IV, Constitution of the United States, and section 5297, Revised Statutes, the President is authorized, upon application therefor by proper State authorities, to employ such of the land and naval forces of the United States as may be necessary for the suppression of domestic violence. This power and responsibility the President can not delegate to a commanding officer.

Ops. J. A. G. 6–020, Oct. 25, 1917.

ARMY I, E: Status of a lance corporal.

A lance corporal is not a noncommissioned officer.

Ops. J. A. G. 72–230, Oct. 9, 1917.

ARTICLES OF WAR XCI: Use of depositions in court-martial proceedings.

In trials for desertion in time of war, the use of depositions on the part of the Government is not allowed. (A. W. 25.) Hence trial judge advocates and convening authorities should, in determining

the place of trial, bear in mind the expense of procuring witnesses; and the trial judge advocates should make careful investigation to determine whether a plea of guilty is to be entered and whether testimony of witnesses is reasonably necessary.

Ops. J. A. G. 30–477.1, Sept. 25; 26–800, Oct. 13, 1917.

ARTICLES OF WAR LIX, I 1: Delivery of soldier to civil authorities.

In time of war the military authorities are not required to surrender to the civil authorities one subject to military jurisdiction and charged with a civil offense. It is recommended as a matter of policy that such surrender be not made, unless the offense charged is a most serious one and the charge is shown not to be without proper foundation and it appears that the accused will be accorded a fair trial without prejudice on account of his military status.

Ops. J. A. G. 14–233, Oct. 30, 1917.

ARTICLES OF WAR CVI: Interpretation of article 48 (b).

The forty-eighth article of war provides for the execution of the sentence of a court-martial dismissing an officer below the grade of brigadier general in time of war "upon confirmation by the commanding general of the army in the field, or by the commanding general of the territorial department or division." The word "division" means territorial division and not tactical division.

Ops. J. A. G. 30–500, 30–525, Oct. 24, 1917.

ARTICLES OF WAR XXI, C 2: Disobedience of illegal order.

Under paragraph 53, Compilation of Orders, an enlisted man commits no offense by refusing to submit to a surgical operation advised by the attending surgeon unless such surgeon (1) executes a formal written certificates stating the general nature of the operation and that, in his opinion, it is without appreciable risk to the life of the soldier and is necessary for the removal of a disability then existing which prevents the full performance of any or all military duties that can properly be required of the soldier; (2) causes such certificate to be made a part of the records of his office; (3) reads the certificate to the soldier; and (4) unless the soldier thereafter refuses to submit to said operation. (But it was recommended that the paragraph be amended so as to apply only in time of peace.)

Ops. J. A. G. 6–227.6, Oct. 23, 1917.

CHAPLAINS: Eligibility of Christian Science Readers.

First Readers of the Christian Science Church are eligible to appointment as chaplains at large under the act of October 6, 1917, authorizing appointment from religious sects not recognized in the apportionment of chaplains now recognized by law.

Ops. J. A. G. 64–233.3, Oct. 10, 1917.

CIVILIAN EMPLOYEES, XIII: Right to wear uniform.

Psychological examiners in the National Army cantonments under civil-service appointments have no military status whatever and are not entitled to wear the uniform of the United States Army.

Ops. J. A. G. 96–140, Oct. 27, 1917.

COMMAND IV, V; ARTICLES OF WAR LXXII, H.

Under paragraph 191, A. R., as amended by General Orders, No. 96, W. D., July 20, 1917, division commanders have full control in all that pertains to administration, instruction, training, and discipline, and have jurisdiction over the personnel of camp quartermasters, as well as other members of the military present in their camps and performing various duties connected with the camps.

Ops. J. A. G. 20–200, Oct. 18, 1917.

CONTRACTS XX: Effect of failure of contractor to furnish bond.

Where a contractor for the repair of a steamer did not furnish a bond, as required by the act of February 24, 1905 (33 Stat. 811), but deposited a certified check in lieu thereof and the check was erroneously returned upon the completion of the work, leaving no protection for possible claims of labor and material men,

Held, that as a bond in connection with such contracts is required by statute not only for the protection of the Government but also for the benefit of labor and material men, final payment on the contract should be withheld by the Government until the contractor furnished a bond as required by the statute in an amount deemed sufficient for the protection of possible claims of labor and material men.

Ops. J. A. G. 76–221, Sept. 8, 1917.

DESERTION V, B: Reward, when payable.

The reward of $50 for the apprehension and delivery of a National Army deserter should be paid even though upon examination he was found to be physically disqualified for military service.

Ops. J. A. G. 26–200, Oct. 26, 1917.

DESERTION V, C, B: Reward, place of delivery.

No greater sum than $50 can be paid for the apprehension and return of a deserter, although the expense of his return may exceed that amount. But there is no objection to designation of a convenient place for receipt of deserters apprehended and delivered by civil authorities, and a detail may be stationed at the designated place to receive such deserters or a guard sent there to receive and return them.

Ops. J. A. G. 26–200, Oct. 11, 1917.

DISCHARGE XXVI, A: Of drafted alien.

Citizens of a foreign country subject to draft may not be released therefrom to permit them to enlist in the army of their own country.

Ops. J. A. G. 34–442, Oct. 6, 1917.

EIGHT-HOUR LAW: Extra pay for overtime work.

The question was presented whether the Government was authorized to pay mechanics employed under lump-sum appropriations extra compensation for overtime work in excess of eight hours a day, such overtime work being authorized in emergencies.

Held, that as there is no law governing the rates of pay of mechanics employed directly by the Government who are paid from lump-sum appropriations, but the terms of their employment are fixed by agreement between the parties, it is discretionary with the depart-

ment to allow, by agreement with such employees, extra pay for overtime work in excess of eight hours; and *recommended*, in view of the prevailing practice in the commercial and industrial world of allowing mechanics and laborers extra pay for overtime in excess of a basic eight-hour day, and of the action of Congress in requiring adherence to this practice as to persons employed on contracts with the United States (act of Mar. 4, 1917, 39 Stat. 1192), that mechanics and laborers employed directly by the Government be placed upon equal terms of employment in this respect.

Ops. J. A. G. 32–211, Sept. 6, 1917.

EIGHT-HOUR LAW: Application to certain contracts.

The act of June 19, 1912, the so-called eight-hour law, excepts from its operation contracts "for such articles and materials as may usually be bought in open market, whether made to conform to particular specifications or not." Consequently contracts for escort wagons, carts, and ambulances, which follow commercial designs, differing mainly in grade and size of material used in their manufacture, are not governed by the provisions of said act.

Ops. J. A. G. 32–313, Oct. 18, 1917.

Contracts for clothing may not contain a provision permitting more than eight hours' work per day for eight hours' pay, even though the week's work be limited to 48 hours. Under the Executive order of March 24, 1917, more than eight hours' work per day is permitted, provided that full pay be given for eight hours, and pay at the rate of time and one-half for overtime.

Ops. J. A. G. 32–300, Oct. 18, 1917.

ENLISTMENT II, B: Conscientious objectors.

Members of well-recognized religious sects whose creed or principles forbid the participation in war are exempted only from combatant service, not from noncombatant military service. Service with the American Red Cross or manual labor performed upon farms or gardens operated for the benefit of the Army on land leased or occupied for military purposes is not military service, and can not be designated by the President as noncombatant military service, assignment to which will relieve conscientious objectors from military service.

Ops. J. A. G. 34–442.1, Sept. 18, 1917.

ENLISTMENT II, A: Date of.

A drafted man is enlisted from the date specified in the notice of the local board or of the adjutant general of the State for the man to report to the local board or at a designated place for military duty. His pay begins upon that date.

Ops. J. A. G. 72–200, Oct. 2, 1917.

ENLISTMENT II, E: Failure to respond to draft.

Drafted persons who fail to respond to the draft are deserters and are subject to trial by courts-martial for desertion. Reward of $50 may be paid for their apprehension and delivery.

Ops. J. A. G. 26–221, Oct. 10, 1917.

ENLISTMENT I, A 9e; II, E: Effect of fraudulent enlistment.

An enlisted man in the National Guard deserted before the National Guard was drafted, and enlisted in the Medical Department, United States Army. After the drafting of the National Guard he was discharged from the latter enlistment for fraudulent enlistment. Held that he was included in the draft of the National Guard; that his present status is that of a deserter from the military service of the United States; and that he is not eligible for reenlistment.

Ops. J. A. G. 58–141, Oct. 4, 1917.

ENLISTMENT I, A 6: Enlistment for restricted service.

Under the act of July 24, 1917, no authority is given to enlist men in the Signal Corps for musical purposes solely and on condition that they shall not be liable to or eligible for general military duty as soldiers.

Ops. J. A. G. 8–150, Oct. 30, 1917.

ENLISTMENT I, C 1a, c: Repatriation.

American citizens who have heretofore enlisted in armies of powers at war with any country with which the United States is at war may have their American citizenship restored under the act of October 5, 1917.

Citizenship is not necessary for enlistment in the United States Army in time of war.

Ops. J. A. G. 13–210, Oct. 13, 1917.

ENLISTMENT I, C 1c: Rights of enlisted alien enemy.

A citizen of Germany who is an enlisted man in the Army of the United States is not forbidden by the President's proclamation of April 6, 1917, to go within one-half mile of any fort, etc., when ordered to do so by his superiors.

Ops. J. A. G. 99–211, Oct. 26, 1917.

GOVERNMENT AGENCIES II, B: Investment of company funds.

Surplus company funds may be properly invested in Liberty bonds.

Ops. J. A. G. 40–221, Oct. 13, 1917.

INSIGNIA OF MERIT, I, C: Distinguished-service medals.

The President as Commander in Chief has authority to provide for distinguished-service medals to be conferred for deeds of gallantry in action and other exceptionally meritorious service, in addition to those medals now provided for by legislative action.

Ops. J. A. G. 46–100, Oct. 27, 1917.

INTOXICANTS: Application of President's regulations.

Section 12 of the act of May 12, 1917, and the regulations thereunder, prohibiting intoxicating liquors within specified distances of camps, apply to military camps in Porto Rico for the mobilization and training of drafted men.

Ops. J. A. G. 48–100, Oct. 8, 1917.

INTOXICANTS: Enforcement of President's regulations.

There is no authority under section 12 of the draft act and the regulations of the President thereunder for seizure of liquor within

the prescribed zones nor for search of premises therein without a search warrant. The regulations are to be enforced through the Department of Justice. Cooperation with the Commissioner of Internal Revenue is advised.

Ops. J. A. G. 48–100, Oct. 20, 1917.

The Federal laws and regulations concerning intoxicating liquors and bawdy houses within prescribed limits of camps and concerning the sale of intoxicants to soldiers in uniform should be strictly enforced, and the commanding officers should request local authorities to enforce rigidly and vigorously the local statutes and regulations as to intoxicants and vice and should cooperate with them so far as possible.

Ops. J. A. G. 48–100, Oct. 23, 1917.

INTOXICANTS: Interpretation of President's regulations.

The word camp as used in the regulations of the President issued under section 12 of the draft act includes not only the space actually occupied by the tents or other cover in which the soldiers live but as well the adjacent territory habitually used by the encamped forces in the performance of their military duties. Within the prescribed limits of such camps the regulations should be rigidly enforced, and no suggestion of local civil authorities to the contrary should be tolerated.

Ops. J. A. G. 48–020, Oct. 20, 1917.

INTOXICANTS: Penalty for violation of President's regulations.

Licenses for the sale of intoxicating liquors granted by the respective States can not be revoked by Federal authority for violation of Federal regulations.

Ops. J. A. G. 48–100, Oct. 9, 1917.

MILITIA: Draft of State staff corps.

Within the terms of the national defense act officers and enlisted men of the usual staff corps and departments of the several States were not members of the National Guard, but this was changed by the Army appropriation act of May 12, 1917. Such officers and men may now be drafted into the Army of the United States, for the President's power was not exhausted by his proclamation of August 5, 1917.

Ops. J. A. G. 58–141, Oct. 30, 1917.

MILITIA VIII, A: Expenses of, after draft.

Necessary expenses for armories, fuel, light, water, etc., for the organized National Guard incurred after August 5, 1917, are proper charges against the United States.

Ops. J. A. G. 80–710, Oct. 8, 1917.

MILITIA III: Grade of wagoner not authorized in separate companies.

In the case of a company of Engineers, National Guard, in the Federal service, there were four men included as wagoners, and the question was presented in connection with their payment whether wagoners are authorized for separate companies of Engineers, National Guard.

Held, That as wagoners do not form a part of the statutory personnel of a National Guard company, which, by section 60 of the national-defense act, must be the same as that prescribed for the Regular Army, they can not be recognized as a part of the authorized personnel of such companies unless they are, in fact, a part of a regiment or mounted battalion, as required by the statute; that separate companies of Engineers, whether of the National Guard or of the Regular Army, can not include as a part of their personnel enlisted men of the grade of wagoners, but that the duties which would in a company forming part of a regiment or of a mounted battalion, be performed by a wagoner must in a separate company be performed by enlisted men of other grades detailed for that purpose or by wagoners detailed from organizations having enlisted men of that grade.

Ops. J. A. G. 58–210, Feb. 1, 1917.

MILITIA I, IV: Status of Home Guards, etc.

During the present war a State may lawfully raise and maintain troops which resemble in all or almost all respects the well-known militia of the several States as it hitherto existed, for service within its own boundaries exclusively. These forces are capable of being called by the Nation into the service of the United States for the usual constitutional purposes, and the members as individuals can be drafted by the Federal Government, but are not subject to draft under second paragraph of section 1 of the national-defense act as members of the National Guard.

Ops. J. A. G. 58–980, Oct. 13, 1917.

OFFICE III, A 7: Acceptance by conduct.

Obedience by a person already in the service to an order directing him to report at a designated place can not be considered acceptance of an appointment of which the said person had no notice or knowledge.

Ops. J. A. G. 64–231, Oct. 13, 1917.

OFFICE III, A 7: Acceptance of, by conduct.

An officer, holding a commission in the Medical Reserve Corps, refused a commission in the medical section of the Officers' Reserve Corps. He continued in active service after the termination of the commission in the Medical Reserve Corps and continued to receive pay as an officer of the Army.

Held, that acceptance of a commission may be implied as well as expressed, that the officer's conduct constituted an acceptance of the commission in the Officers' Reserve Corps, and that he should be required to take the oath prescribed by law.

Ops. J. A. G. 64–218.3, Oct. 19, 1917.

OFFICE IV, E 2; DISCHARGE XX: Discharge of National Guard officers after draft.

Upon the draft of the National Guard into the Federal service officers thereof became officers of the United States Army and can thereafter be discharged only under section 9 of the act of May 18, 1917. Paragraph 19, Special Regulations 55, War Department, 1917. does not apply.

Ops. J. A. G. 64–350, Oct. 15, 1917.

OFFICE III, A 1: Eligibility for appointment.

A man who has completed one year's service in the National Army may become a candidate to fill a vacancy in the grade of second lieutenant in the Regular Army created or caused by the increase due to the operation of the act of June 3, 1916, but not for a vacancy not so caused. The phrase "except as to promotions" in section 2 of act of May 18, 1917, applies exclusively to officers.

Ops. J. A. G. 64–212, Oct. 10, 1917.

OFFICE III, A 1: Qualifications for appointment as second lieutenant, Regular Army.

Section 24 of the national-defense act, as amended by the act approved May 12, 1917, provides, with reference to the filling of vacancies in the grade of second lieutenant, Regular Army, for the appointment—

"Under provisions of exisiting law * * * of members, including officers, of the Organized Militia, the National Guard, or Naval Militia, between the ages of 21 and 34 years who have had at least ninety days' actual Federal military service under any call of the President during the calendar year nineteen hundred and sixteen, and whose fitness for promotion shall have been determined by examination,"

Held, that a person who had been discharged from the National Guard and had entered a training camp as a candidate for a commission was not eligible for appointment as a second lieutenant under the said provision, as the qualification of membership in the National Guard must exist at the date of appointment.

Ops. J. A. G. 64–213.3, Aug. 17, 1917.

Held further, that a National Guard enlisted man furloughed to the National Guard Reserve was eligible for appointment under the said provision as he continued to be a member of the National Guard.

Ops. J. A. G. 58–214, Sept. 26, 1917.

Held further, that no person is eligible as a member of the National Guard for appointment as a provisional second lieutenant in the Regular Army under section 24 of the national defense act, as amended by act of May 12, 1917, unless he is a member of the National Guard at the date of appointment. It is immaterial that they were members of National Guard at date of examination.

Ops. J. A. G. 64–213.3, Oct. 10, 1917.

PAY AND ALLOWANCES I, B 6, C 6: Longevity and continuous-service pay.

Officers and enlisted men of the National Guard are, when drafted into the Federal service under the act of June 3, 1916, entitled to credit for their prior service, both State and Federal, in the National Guard, for purposes of longevity and continuous-service pay. But this right is limited to those actually brought into the service as National Guardsmen under the draft. (As to rank, see below.)

Ops. J. A. G. 58–631; 72–130, Oct. 27, 1917.

PAY AND ALLOWANCES I, A 1a; II, A 3: Of drafted men upon discharge.

Drafted men who are exempted after their arrival at the mobilization camp are entitled to receive pay for the time spent after

their order to the camp until their discharge and, in addition thereto, an amount equal to 3½ cents per mile from the mobilization camp to the place from which they were ordered to said camps.

Ops. J. A. G. 94–245, Oct. 15, 1917.

PAY AND ALLOWANCES I, C; II, A 3: Of men in training camps.

Enlisted men of the National Guard, as well as students at Signal Corps aviation schools, while being trained as officers in training schools or camps are entitled to the same pay and allowances as candidates at reserve officers' training camps.

Ops. J. A. G. 72–200.1, Oct. 9, 1917.

PAY AND ALLOWANCES II, A 2d: Officer's private mount.

An officer owning a private mount acquired by him before receipt of General Order No. 113, who is ordered to foreign service and is not required to take his mount with him, may have said mount cared for at a remount depot at public expense while such officer is on duty abroad, but he must send the mount to such depot at his own expense.

Ops. J. A. G. 94–011, Oct. 23, 1917.

PAY AND ALLOWANCES I, C 5: Reenlistment pay is not bounty within prohibition of act of May 18, 1917.

The question was presented whether the provision in the National Army act, approved May 18, 1917 (Bul. 32, War Dept. 1917), that "no bounty shall be paid to induce any person to enlist in the military service of the United States," repealed the provision in the act of May 11, 1908 (35 Stat. 110), authorizing the payment of a sum equal to three months' pay to any honorably discharged soldier upon his reenlistment within three months after his discharge:

Held, That the three months' gratuity authorized by the act of May 11, 1908, upon the reenlistment of an honorably discharged soldier is not a bounty within the prohibition of the act of May 18, 1917, and that the former act was not repealed by the latter.

Ops. J. A. G. 72–030, Sept. 26, 1917.

PAY AND ALLOWANCES II, A 2: Subsistence of officers on Army transports.

There is no authority of law for the allowance of free subsistence to officers stationed on Army transports.

Ops. J. A. G. 94–100, Oct. 15, 1917.

Naval officers in charge of naval gun crews on United States Army transports are not entitled to their subsistence at Government expense.

Ops. J. A. G. 94–124.1, Oct. 8, 1917.

PUBLIC PROPERTY I: Illegal sale.

Where an officer sold an old storehouse on a Government reservation under instructions from the War Department, but without the inspection and survey required by section 1241, Revised Statutes:

Held, That the sale was illegal, and, as the money had not been deposited in the Treasury, the officer should be directed to refund the same to the purchaser and, after submitting the property to inspection, to sell it in accordance with the method prescribed by paragraph 680, Army Regulations.

Ops. J. A. G. 80–132, Sept. 26, 1917.

RANK II: Effect of service in National Guard for purpose of determining rank.

The National Guard as an organization never becomes federalized. Its members become a Federal force only when drafted into the Army of the United States, and its officers become officers of the United States only when, upon the draft, they become appointed officers of the Army of the United States. Therefore service as a commissioned officer of the National Guard as such, either out of the service of the United States or in the service of the United States, for constitutional purposes, can not be counted in determining rank within section 1219, Revised Statutes.

In determining rank of officers of the Army of the United States, Revised Statutes, section 1219, and the one hundred and nineteenth article of war must be construed together. The one hundred and nineteenth article of war has to do with arranging all officers in the service of the United States into classes and specifying the order of precedence of these classes. Revised Statutes, section 1219, finds its field of operation only in determining rank *inter sese* between officers of the same grade and date of appointment within a single one of the several classes enumerated in the one hundred and nineteenth article of war.

Ops. J. A. G. 82–200, Oct. 17, 20, 22, 1917.

MEMORANDUM FOR THE ADJUTANT GENERAL.

82–200.

OCTOBER 17, 1917.

Subject: Whether service as a commissioned officer in the National Guard in the service of the United States, or otherwise, may be counted as service as a commissioned officer of the United States for the purpose of determining rank of officer of the Army of the same grade and date of appointment.

1. This question has been before this office several times, but has never been comprehensively considered. There seems to be a diversity of view within the department itself to which certain opinions and expressions of this office have contributed. I have before me at the present time the question of the relative rank of four brigadier generals now on duty with the Twenty-eighth Division, and in considering that case it is deemed opportune for this office now to endeavor to give final expression to its views. Fair examination of the question will show that it is neither obscure nor difficult.

2. At the base of the matter we find the following statutes:

"ART. 119. *Rank and precedence among Regulars, Militia, and Volunteers.*—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army

by order of the President; second, officers of forces drafted or called into the service of the United States; and, third, officers of the volunteer forces: *Provided*, That officers of the Regular Army holding commissions in forces drafted or called into the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; the rank of officers of the Regular Army under commissions in the National Guard as such shall not, for the purpose of this article, be held to antedate the acceptance of such officers into the service of the United States under said commissions."

Section 1219, Revised Statutes:

"In fixing relative rank between officers of the same grade and date of appointment and commission the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account. And in computing such time no distinction shall be made between service as a commissioned officer in the Regular Army and service since the nineteenth day of April, eighteen hundred and sixty-one, in the volunteer forces whether under appointment of commission from the President or from the governor of a State."

It is to be observed that section 1219, Revised Statutes, applies to officers of the Army, without express regard to classes; and that the one hundred and nineteenth article has to do with arranging all officers in the service of the United States into classes and specifying the order of precedence of these classes. Obviously, an officer of the senior class will rank any officer of the same grade in a junior class, regardless of respective dates of appointment or other incidents of office. In the determination of rank as between officers of the same grade and date of appointment of the different classes enumerated in the one hundred and nineteenth article, section 1219, Revised Statutes, can have no application whatever, and, construing the two statutes together as they must be construed, the latter finds its field of operation only in determining rank *inter sese* between officers of the same grade and date of appointment within a single one of the several classes enumerated in the article. Inasmuch as, as a practical present-day matter, we are no longer concerned with volunteers nor with the National Guard called into the service of the United States, in which capacity none such are now serving, the question specifically applied is, whether such commissioned service in the National Guard shall be counted in determining rank where grade and date of appointment are the same between (1) Regular officers (and Marines attached), and (2) all other officers of the Army, which term includes (*a*) officers of organizations composed of erstwhile members of the National Guard, (*b*) officers of the so-called National Army, a term applied to all other additional forces, and (*c*) reserve officers, who fall within the same class.

3. But, preparing to apply the rule of the statute to the present inquiry, what is actual service as a commissioned officer of the United States? In the first place, it must be observed that the service is required to be service as a *commissioned officer of the United States.* The service must be as such commissioned officer, perhaps not necessarily as a *de jure* but certainly as a *de facto* officer of the United States. The office must be an office of the United States, established

in all respects by the laws of the United States, and the appointment must be made in the manner provided by the Constitution and laws of the United States.

The method of appointment of officers of the United States is found prescribed in section 2, article 2 of the Constitution, which in relevant portion is as follows:

"He (the President) shall nominate and by and with the advice and consent of the Senate shall appoint * * * all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law, but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

All officers of the United States must be appointed in accordance with the above provision of fundamental law. National Guard officers are not so appointed. They are appointed by and under State sovereignty.

Furthermore, by the context, the section clearly has reference to service in the Army of the United States. Service in the National Guard, whether when called into the Federal service or otherwise, can not be the service defined which the statute requires. The officers of the National Guard are not officers of the United States, and the National Guard itself, whether within or without the service of the United States, is no part of the Army of the United States.

4. Whatever be the degree of Federal control over the National Guard, when it is not in the service of the United States or when it is, that institution is primarily a State institution; its officers are State military officials, appointed by the governor and subject largely to his and other local control. The sharp legal and historical distinction between National Guard of the several States, an *alter nomen* for the militia of the several States, and the Army of the United States is fundamental, and can not be broken down or obscured by legislation, and the existing legislation has no such effect. To be sure, the National Guard under the national-defense act is something other than the National Guard as it had existed under the Dick bill and as it had existed prior to the Dick bill. It can not be said, however, that it is, or can be, divested of its fundamental militia status. True, under existing legislation there is superimposed upon the militia status of the individual another obligation, namely, the obligation to serve in the Army of the United States when the individual militiaman is drafted therein. But, obviously, that obligation adds nothing whatever to the national power which Congress, under its authority to raise and support armies, could otherwise have asserted over members of the Organized Militia, regardless of such personal obligations. Members of the Organized Militia are subject to be drafted into the Army of the United States, as are all other citizens of the United States, and the personal obligation upon their part adds naught to that national power.

The militia status of the National Guard remains unaffected up to the point where the individual members thereof are by draft placed into the Army of the United States. Whether the National Guard, therefore, be not in the service of the United States, or whether it be called into the service of the United States as such for the constitu-

tional purpose "to execute the laws of the Union, suppress insurrection, and repel invasion," it is still a State force, and its relation to the Federal Government is that of a State military force subject, under the Constitution, to be requisitioned as such for limited Federal purposes. The organization never becomes federalized. Its members become a Federal force only when drafted into the Army of the United States, and its officers become officers of the United States only when upon the draft they become appointed officers of the Army of the United States.

5. The national defense act never loses sight of this distinction. The constitutional power of Congress to call the militia into the Federal service is invoked, for instance, by section 101 of the bill, which contemplates the call of the National Guard as such; that is, as Organized Militia for the specified constitutional purposes. When in the active service of the United States under such a call the militia serves as militia of the several States. But an entirely different constitutional power is invoked by section 111 of the national-defense act. That section provides for the draft of the members of the militia into the Army of the United States for general war purposes. There the constitutional power of Congress to raise and support armies is invoked, and in such a case the members of the National Guard are drafted not as members of the National Guard or militia, nor do they serve as militia, but as members of the Army of the United States. There is no such thing, then, as drafting the National Guard into the Federal service as such; only its members as individual citizens are drafted. The National Guard, with its officers, its organizations, and its organizational relations, is not drafted. That this is so the act clearly recognizes. It provides for the draft of "any or all *members*" of the National Guard and of the National Guard Reserve. It refers to the members of the National Guard as "persons so drafted." It requires that the persons so drafted "shall be embodied in organizations corresponding as far as practical to those of the Regular Army, or that they be otherwise assigned as the President may direct." It provides for the commissioning, by the President, of the officers of said organizations; and, most potent of all, provides that "all persons so drafted shall from the date of their draft stand discharged from the militia." There is absolutely no connection, in the eyes of the law, between the status which an individual occupies as a member of the National Guard and the status which he occupies after he has been drafted into the service of the United States, and there is no connection between those two status. The service of an officer in the former capacity is not service as a commissioned officer of the United States, nor is it service in the Army of the United States. The service of an officer in the latter capacity is, of course, service as a commissioned officer in the Army of the United States. Nor is this distinction obliterated by the fact that section 1 of the national-defense act includes as one of the component elements of the Army of the United States "the National Guard while in the service of the United States." The National Guard called for constitutional purposes into the service of the United States is obviously not a part of the Army, the entire act preserves the distinction, and the phrase quoted can have reference only to the members of the National Guard drafted into the Army.

It is obvious, therefore, that service as a commissioned officer of the National Guard when not in the service of the United States, or when called into the service of the United States for constitutional purposes, can not constitute the service which section 1219 of the Revised Statutes contemplates.

6. But there is a suggestion that the one hundred and nineteenth article of war, wherein it establishes an order of class precedence placing the militiaman in the service of the United States ahead of the volunteer, operates as a repeal of section 1219, Revised Statutes. But, as hereinbefore adverted to, the evident purpose of the one hundred and nineteenth article of war was to arrange the order of precedence of the several classes of the commissioned officers of the forces in the service of the United States, and not to determine the rank and precedence as among the officers of the different classes. Whatever inference may be had from ranking the National Guard called into the service of the United States ahead of the volunteer as a class, that inference can not go so far as to operate as a repeal of section 1219, Revised Statutes. The sections can stand together. Indeed, considering their different purposes, there is no conflict between them. They are not even *in pari materia*, and there can not be found the slightest authority among all the principles of statutory construction for holding that section 1219, Revised Statutes, was in the least impaired by the change of precedence in class in the one hundred and nineteenth article of war. If those who framed the new one hundred and nineteenth article had intended to accomplish what some think they did accomplish by that article, they should have amended section 1219 of the Revised Statutes.

7. I know there was an expression in a recent opinion by this office upon the same subject which tends to confuse the distinction between an officer of the National Guard who had been drafted as an individual into the Army of the United States and thereupon appointed by the President as an officer, and his status as an officer of the National Guard called into the Federal service as such, but that expression was inadvertent, and the attention of the office was not especially directed to it. And, further, in an opinion by this office dated November 16, 1916, it was said that service as a commissioned officer of the National Guard called into the service of the United States was commissioned service within the meaning of said section 1219, Revised Statutes, but for the reasons hereinbefore advanced, in my judgment that opinion of this office was clearly wrong and proceeded upon erroneous reasons. The reasoning there employed was that the term "volunteer forces" as used therein had reference to all forces in the actual service of the United States other than the Regular Army. But this reasoning is beside the point, as the statute itself requires service as a commissioned officer of the United States, and the distinction made in the concluding sentence of the section is for the purpose of establishing a parity for the purpose between service in the Regular Army and in the Volunteers, and not for the purpose of including within the service defined by the statute any service not rendered as a commissioned officer of the United States. But that reasoning is otherwise erroneous. The term "volunteer forces" as there used could not have included service in the Organized Militia called in the service of the United States, for the statutes as they existed at that time, and as they still exist, make a specific distinction

between the "volunteer forces" and the militia called into the service of the United States. See the old one hundred and twenty-fourth article of war (as well as the present one hundred and nineteenth article of war). That article established the order of precedence of the several classes as Regulars, Volunteers, and the Militia, called into the service of the United States in the order named. So the law remained until the article was amended in 1910, so as to exchange the position of the Volunteers and the Organized Militia in the service of the United States and place the Organized Militia so it would have rank and precedence as a class over the Volunteers; and, of course, the one hundred and nineteenth article of war does no more than preserve that precedence. While the order of precedence as between classes was changed, section 1219 of the Revised Statutes, establishing rank within classes, remained amended.

8. As another reason this office said:

"The National Guard in the service of the United States during the last few months has served in the same capacity as would any volunteer forces under the same circumstances, and the benefits of training incident thereto have presumably been equal to those which would have obtained in a volunteer force of the strictly legal character."

But there the opinion distinctly enters the field of legislation. Besides, that reasoning involves a fact which may be open to dispute. Moreover, as a legal concept, the distinction between the volunteer and the National Guardsman called into the service of the United States for constitutional purposes can not be thus dismissed. The volunteer was a part of the Army of the United States; the National Guardsman under those circumstances is not. The volunteer was subject to the performance of military duty the world over; the National Guardsman only within the territorial limits of the United States. The primary purpose of the one was to fight the battles of this country wherever the war might be waged; the primary function of the other is to preserve the peace and repel invasion. True it is that when engaged in the same theater the officer called into the service for constitutional purposes and the officer who has been appointed in the drafted forces now rank together, and both rank the volunteer in the same theater, and both rank behind the regular. But when the officer of the National Guard called into the service of the United States figures in the classification, the military forces are operating at home. When thus operating there could in fact be cogent reasons for ranking the National Guardsman as a class ahead of the volunteers. The law requires that in such circumstances the National Guardsman shall be called out first. While thus engaged in defense of the home soil, placed there by virtue of his position as a National Guardsman, in advance of the volunteer, whose primary purpose is not ordinarily for such local defense, his order of precedence ahead of the volunteer may for those reasons alone be justified. It does not follow, however, that when the officer of the National Guard is divested of his status as a National Guardsman and is no longer serving as such, but is appointed to and serving in the Army of the United States, that he should be permitted to count the service which was not rendered in the establishment to which he has been appointed. I am reminded also that National Guard officers drafted into the Army of the United States have been held by the comptroller to be entitled to count their

service in the National Guard for purposes of computing longevity pay, but that is beside the question. Rank here is a mere matter of the statute, to be determined under the statute and not by general considerations of service and compensation therefor.

9. For the reasons herein advanced I am convinced that an officer of the Army of the United States may not count his commissioned service in the National Guard when called into the service of the United States for constitutional purposes in order to establish his rank as over other officers of the same grade and date of appointment who have had former commissioned service as an officer in the Army of the United States.

RANK II: Method of determining.

Under the thirty-eighth section of the national-defense act of June 3, 1916, and the one hundred and nineteenth article of war, captains in the Regular Army assigned to active duty as junior military aviators and automatically thereby obtaining the rank of major outrank and have precedence over officers of the same grade in any forces drafted or called into the service of the United States, such as the Officers' Reserve Corps.

Ops. J. A. G. 82–200, Oct. 12, 1917.

STATE LAWS: Applicability of, to Federal operations.

In connection with certain construction work on a military reservation by a contractor, the State authorities called upon the constructing quartermaster to make a deposit with the State treasurer of 1½ per cent of the pay of the workmen engaged in hazardous work—upon scaffolding and the like—in accordance with the requirements of the State law.

Held, That the State authorities were without jurisdiction to require the deposit demanded, for the reason that the operations of the Federal Government are entirely beyond the power of State regulation; and for the further reason that the work in question was carried on within a military reservation over which the State had ceded its jurisdiction.

Ops. J. A. G. 76–050, Sept. 5, 1917.

UNIFORM I: Right of reserve officers to wear.

A reserve officer not called into active duty is not authorized to wear the uniform of the United States Army.

Ops. J. A. G. 96–140, Oct. 30, 1917.

UNIFORM I: Right of Home Guards to wear.

Home Guards may not, without authority therefor from the Secretary of War, wear any uniform which bears a prohibited similarity to the uniform of the United States; but the Secretary of War has power to grant such authority on condition that the uniform bear some mark or insignia distinguishing it from the uniform prescribed for the United States Army.

Ops. J. A. G. 58–980, Oct. 17, 1917.

WAR I, C: War powers of Executive.

The Executive has power in time of war, when reasonable necessity exists therefor, to take the necessary means to prevent the flying

of aircraft during war, except such as is permitted by the War Department.

Ops. J. A. G. 6–228.1, Oct. 11, 1917.

NOTES ON ADMINISTRATION OF MILITARY JUSTICE.

SENTENCES: Dishonorable discharge.

In a recent case the court imposed a sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for two years (mitigated to one year by the reviewing authority) upon a soldier convicted of having "a rusty pistol for inspection" and failing "to clean his pistol" after having been "directed" and "having received a lawful order" to do so. The Judge Advocate General, in recommending that the unexecuted portion of the sentence be remitted and that the soldier be restored to duty upon his written application therefor or be allowed to reenlist if he so desires, made the following comment:

"In time of war, when the Nation is straining every nerve to build up a large and efficient Army and is even resorting to a selective draft for the purpose of procuring men, it seems incongruous and inconsistent to impose a sentence of dishonorable discharge for such an offense as is shown to have been committed in this case. To require the Government to guard and subsist this man for a year while he performs no service, in face of the fact that his offense could have been more effectively punished by disciplinary measures not involving dishonorable discharge, is to impose an unnecessary burden upon the Government and possibly to subject some other citizen to compulsory military service in his stead."

TRIAL: Evidence; Improper questions.

In several recent cases each of the judge advocates, in beginning the examination of witnesses, propounded a general question practically involving a verbatim reading of the charges and specifications and concluding with a request that the witness state to the court what he knows about the case. Such practice is loose and objectionable, as encouraging irrelevant and hearsay testimony, and should be discontinued, as it constitutes a leading of the witness. He is thus instructed as to the particulars about which he is to testify and the charge he is expected to substantiate. A witness should properly be examined on specific interrogatories and not be called upon to make a general statement of what he knows about the matter under investigation in answer to a single general question. (Dig. Ops. J. A. G. 1912, 531, note 2.)

CHARGES OF OFFENSES.

The review in this office of records of trial by general court-martial discloses a quite general practice of bringing charges for offenses committed prior to March 1, 1917, under the new Articles of War, which became effective on that date. Especially is this true with respect to charges of desertion.

Section 5 of the act of August 29, 1916, containing the new Articles of War, provides for the continuance in force of the old articles for the prosecution of offenses committed prior to March 1, 1917.

While the error referred to above is not fatal to the validity of the trial, the practice of laying charges under the new articles for offenses committed prior to their taking effect is irregular and should be discontinued. For all offenses committed prior to March 1, 1917, the charges should be brought under the old articles.

DECISIONS OF COURTS.

SELECTIVE DRAFT ACT: Constitutionality.

Maurice Sugar and others were indicted for conspiracy to aid and procure persons to violate the act of May 18, 1917. On motion to quash the indictment, the court held that the act does not violate the thirteenth amendment forbidding involuntary servitude; that it does not violate the fourteenth amendment forbidding abridgment of privileges or immunities of citizens; that it does not violate the fifth amendment, or the constitutional inhibition of the delegation of legislative or judicial powers to an executive officer; that the provision for the raising of an army by draft is a proper exercise of the power of Congress to raise and support armies; that the drafting of the National Guard does not call forth the State militia as such; and that the act is constitutional. *United States* v. *Sugar*, U. S. Dis. Ct. E. D. Mich. July 10, 1917, 243 Fed. 423.

John Story was imprisoned under commitment for unlawfully failing to register for military duty as required by the act of May 18, 1917, and made application for a writ of habeas corpus. In denying the writ the court held the act constitutional, overruling the contention that its provisions violate the thirteenth amendment. It also specifically met the argument that the petitioner had the right to remain in the realm and could not be drafted for service overseas by saying:

"But our organic law does not so shackle the gigantic energies of the great Republic. After the enumeration of the powers of Congress, among them, as we have seen, 'the power to raise and support armies,' in clause 18 of article 1, section 8, it provides the power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof.' Here is the great reservoir of power to save the national existence.

"It is said that there is no express power to send armies beyond the sea. True; but there is no express power to enact the criminal laws of the United States; none to convey the public domain, to build transcontinental railroad nor to construct the Isthmian Canal; nor to create the Interstate Commerce Commission; nor to declare the Monroe Doctrine; nor to make the Louisiana Purchase; nor to buy Alaska; or to take over Porto Rico and the Philippines. This has all been done under the great power to promote the general welfare, just as the selective army will be created under the law here assailed 'to provide for the common defense.' And beyond and above all is the inherent power of every nation, however organized, to utilize its every man and its every energy to defend its liberty and to de-

feat the migration to its soil of mighty nations of ferocious warriors, whose barbarous inhumanity for three years has surpassed all others since the death of Attila, the Scourge of God."

Story v. *Perkins*, U. S. Dist. Ct. S. D. Ga., 243 Fed., 997.

SELECTIVE DRAFT ACT: Constitutionality; Finality of decisions of local boards.

John Angelus, a citizen of Austria, claimed exemption before a local board on account of alienage and filed an affidavit in support thereof. The local board denied his claim, and the district board affirmed the action of the local board. Angelus brought a bill in equity to restrain the local board from certifying his name to the military authorities for military service. The district court dismissed the bill for lack of jurisdiction, saying:

"I think Congress had no intention that the courts should interfere with this drafting proposition. It is a military measure in time of war, and it would be most subversive of military control and the proper disposition of this extremely difficult new problem if the courts should interfere in this situation. If Congress had intended that the courts should review the action of the local and district boards, it would have so provided, and unless an appellate court says to the contrary I am of the opinion that a district court of the United States should resolve any doubt in favor of the Government; any other view might tend seriously to embarrass the work of raising an army with its manifold difficulties and its tremendous detail. If those who believe they are entitled to exemption were able to apply to the courts, it would be a most disturbing situation and directly contrary to my understanding of the intent of Congress. Congress intended this to be an executive measure, to be carried out by the executive branch of the Government without interference of the courts."

Upon appeal the Circuit Court of Appeals affirmed the order of the district court, holding that, under the power to raise and support armies, Congress has the right to raise armies by conscription, and that it did not by the terms of the act unconstitutionally delegate its powers to the President. As to the proper jurisdiction of the local and district boards, the court said:

"But it is said that the act is unconstitutional in that it deprives the complainant of his liberty without due process of law, contrary to the fifth amendment of the Constitution, which declares that no person shall be deprived of life, liberty, or property without due process of law. The Supreme Court has, however, held that a judicial trial does not prevent in every case. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How., 272, 280, 1855. And in *United States* v. *Ju Toy*, 198 U. S., 253, 263, 1905, the court, speaking through Mr. Justice Holmes respecting the Chinese exclusion act, under which the decision of the Department of Labor is final as to the exclusion, said: 'If for the purpose of argument we assume that the fifth amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial.' That the decision of the question whether a person of Chinese descent was born in the United States and therefore entitled to enter the country, or whether he

was born in China and under the exclusion act not entitled to enter, may be intrusted to an executive officer whose decision is final and that it is due process of law, is established law. We see no reason why the same doctrine is not equally applicable to the case in hand. And we therefore hold that the complainant is not deprived of due process of law by being compelled to submit to the final decision of the local and district boards the question whether he is a subject of Austria-Hungary and whether he has not declared his intention to become a citizen of the United States.

* * * * * * *

"If the complainant is, as he alleges, a subject of Austria-Hungary and has never declared his intention to become a citizen of the United States, as he also alleges, it is perfectly clear that he is not subject to the draft. Whether his allegations in this respect are true must, however, be determined in the manner prescribed by the act.

"It appears from the allegations of the complaint that the complainant filed an affidavit claiming exemption by reason of the fact that he was an alien and that the local board denied his application and that he appealed to the district board, which affirmed the local board. It thus appears that the complainant was heard, and it is nowhere alleged that he was denied a full hearing or that the board rejected or refused to consider any evidence that he was entitled to present. In the absence of such a showing we have no doubt that the decision of the board is final and can not be interfered with by the courts.

"We do not, however, agree with the statement of the district judge heretofore quoted that there can be no interference of the courts in the action of these boards. We think a decision of the boards is final only where the board has proceeded in due form and where the party involved is given a fair opportunity to be heard and to present his evidence. But if an opportunity to be heard should be denied, there can be no doubt as to the right of the aggrieved party to come into the courts for the protection of his rights. And we do not believe that the district judge meant to say that a decision must be regarded as final under such circumstances.

"The law courts have a general superintending control by certiorara over all inferior tribunals acting in a judicial or quasi judicial character. And jurisdiction is not entirely taken away by the words of a statute which declares that the judgment of the inferior tribunal shall be final.

* * * * * * *

"There can be no doubt, therefore, that under the conscription act, where a board has denied a full and fair hearing to an individual claiming exemption from military service, he might, if restrained of his liberty, sue out a writ of habeas corpus and obtain his liberty.

"But whatever remedy the complainant may have or not have there can be no doubt that he is not entitled to the relief he asks in his bill of complaint. * * *

"While disagreeing, therefore, with the opinion expressed by the district judge that the courts can not interfere with the action of the boards and holding as we do that the civil courts can afford relief from orders made by such boards in any case where it is

shown that their proceedings have been without or in excess of their jurisdiction or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act, we nevertheless approve the conclusion he reached that the bill should be dismissed."

Angelus v. *Sullivan*, U. S. C. C. A. 2d Circ. October, 1917, 45 Wash. L. Rep. 691.

SELECTIVE DRAFT ACT: Exemptions.

Held, That a person who enlisted in the Regular Army for seven years in the year 1914 and purchased his release and was honorably discharged in April, 1916, was not exempt from the draft; that the act of May 18, 1917, specifies the exempted classes in clear and unambiguous language, and ought not to be enlarged by judicial construction. The petition for the writ of habeas corpus was accordingly dismissed.

Re Jack Cohen, decided Oct. 17, 1917, by U. S. District Court for District of Mass.

Blackington enlisted in the National Guard. Although he was below the minimum height and was suffering from a depressed fracture of the skull, he was certified by the medical examiner as being above height and fit for military service. This certification was made by the medical examiner through personal malice against Blackington. Blackington was drafted into the Federal service as a member of the National Guard and was passed by the regular medical examiners. *Held*, That although Blackington actually was and is unfit for military service, he has no ground for complaint. The petition for writ of habeas corpus was therefore dismissed and the writ discharged.

Re Carl Blackington, decided Oct. 17, 1917, by U. S. District Court, District of Mass.

PERIOD OF ENLISTMENT: National defense act; Effect of unauthorized furlough.

Roach enlisted on April 24, 1914, in the Alabama National Guard for the period of three years. On June 29, 1916, he took the oath prescribed by section 70 of the national defense act. On July 1, 1916, the company of which Roach was a member was mustered into the service of the United States. On April 24, 1917, Roach requested to be furloughed to the National Guard Reserve, but his papers were not propery made out. He continued to do duty until June 22, 1917, when his company commander again sent a request that Roach be furloughed to the Reserve. While awaiting action on the request the company commander permitted him to surrender all Government property, gave him transportation to his home, and directed him to go there and await receipt of papers evidencing his furlough. On July 26, 1917, Roach's request for furlough to the Reserve was returned from headquarters disapproved. Shortly thereafter, and prior to August 5, 1917, Roach was informed that his request for furlough had been denied and was ordered to report back to his company for service. This he declined to do, and had an altercation with the officer who ordered him to return to his company. He

was placed in the Montgomery County jail under arrest pending his trial by military authorities on the charge of striking a superior officer.

He secured a writ of habeas corpus. The return of the sheriff to the writ showed that he was holding Roach under the circumstances above stated.

Held, That under the provisions of the national defense act an enlisted man is not automatically furloughed to the Reserve upon the expiration of his enlistment; that the acts of the company captain without the approval of the War Department could not operate as a discharge of Roach or as a furlough to the Reserve; and that Roach be remanded to the custody of the United States military authorities and his petition for discharge on habeas corpus be denied and dismissed.

Ex parte Roach, U. S. Dist. Ct. N. D. Ala. Aug. 14, 1917, 244 Fed. 625.

SELECTIVE DRAFT ACT: Draft of alien minor enlisted in National Guard; jurisdiction of civil courts.

Hackenberg, a native of Austria, who came to the United States in June, 1914, enlisted in June, 1915, in the National Guard of Ohio, declaring himself to be 21 years of age. On July 2, 1916, he took the Federal enlistment oath prescribed by section 70 of the national defense act, after his company and regiment had responded to the mobilization order of the President for service on the Mexican border. He was mustered out of the Federal service on March 2, 1917. On July 10, 1917, he was called into Federal service, pursuant to the second paragraph of the selective draft act of May 18, 1917, and reported for duty. On July 30 he was placed under arrest, and on August 3 the charge of violating the fifty-fourth article of war by fraudulently enlisting was placed against him. Hackenberg was 18 years of age when he enlisted; his widowed mother, who was in Austria at the time, knew nothing thereof, and is dependent upon him for support. On his behalf one Dostal made application for a writ of habeas corpus. Respondent's answer and the testimony given at the hearing developed the above facts. The court, in dismissing the petition, held as shown in the following head notes:

"As national defense act, June 3, 1916, permits the enlisting of a minor over the age of 18 without the written consent of his parent or guardian, where one over 18 and under 21, who had enlisted prior to the passage of that act, subsequently took the Federal enlistment oath prescribed by section 70 thereof, the defects in his original enlistment were immaterial, and any right of the parent or guardian to reclaim his cutody or control was extinguished.

"An alien, offering to enlist and accepted as a soldier, can not avoid his contract of enlistment, and thereby escape liability for service or to punishment, especially as Comp. St. 1916, sec. 1888, providing that no person who is not a citizen, or who has not made a legal declaration of his intention to become a citizen, shall be enlisted for a first enlistment, is limited to enlistments in time of peace.

"There is nothing in the treaty between the United States and the Government of Austro-Hungary invalidating an enlistment by a native of Austria.

"National defense act, section 58 (Comp. St. 1916, sec. 3044) provides that the National Guard shall consist of the regularly enlisted

militia, etc. Section 70 provides that enlisted men in the National Guard, whose enlistment contracts contain an obligation to defend the Constitution of the United States and obey the orders of the President, shall be recognized as members thereof, and that others shall not be so recognized until they have signed the enlistment contract and taken the oath therein provided. Section 111 (Comp. St. 1916, sec. 3045) and selective draft law, May 18, 1917, authorize the President to draft all members of the National Guard into the military service of the United States. *Held*, that an order of the President, calling a company and regiment of the National Guard into the Federal service, made a member of such company and regiment, whose original enlistment contract contained the obligation prescribed by section 70, and who, when previously called into the Federal service, had taken the additional oath prescribed by that section, a soldier of the United States Army subject to military trial or punishment, though he had not consented to be mustered into the military forces of the United States under such order.

"Where a minor enlists without the written consent of his parent or guardian an application by the parent or guardian for his release must be made with reasonable diligence after acquiring knowledge of the enlistment, and before an offense has been committed by the minor, and after an offense has been committed, and especially after he has been placed under arrest and charges have been preferred against him, it is too late for the parent or guardian to oust the jurisdiction of the military authorities by an application for a writ of habeas corpus.

"That an enlisted soldier has a mother, of whom he is the only support, does not make void his contract of enlistment.

"One who enlisted in the National Guard, was accepted, took the prescribed oath, and later took the Federal enlistment oath, as prescribed by national defense act, June 3, 1916, c. 134, sec. 70, 39 Stat. 201 (Comp. St. 1916, sec. 3044i), and received pay and clothing over a long period from the State and Nation, is a soldier, subject to the jurisdiction of a military tribunal for any offense committed against military law, though he was under 21 when he enlisted, and enlisted without the written consent of his parent or guardian, and though he was an alien, who had not made the declaration of his intention to become a citizen, and though he had a mother dependent upon him for support.

"If a military tribunal has jurisdiction to try a person charged with an offense against military law, the civil courts can not interfere by writ of habeas corpus."

Ex parte Dostal, Dist. Ct. N. D. Ohio, Aug. 15, 1917, 243 Fed. 664.

STATUS OF NAVAL OFFICER FOR PURPOSES OF COMPUTING PAY.

"Under act March 3, 1899, c. 413, sec. 13, 30 Stat. 1007 (Comp. St. 1916, sec. 2818), providing that 'all officers, including warrant officers who have been or may be appointed to the Navy from civil life shall on the day of appointment be credited, for computing their pay, with five years' service,' which entitles the appointee to an increased rate of pay, an enlisted man who while in the service took the examination for a higher position, and having passed, and two days before his appointment, and when it was practically assured, obtained his discharge from the service, can not be rated as an appointee from civil

life in the sense of the statute, but his appointment must be considered as a promotion in the service.

"Where, however, such officer was rated as an appointee from civil life, which he was according to the strict letter of the law, for a number of years, and vouchers for the increased pay were approved, he is entitled to retain such pay up to the time when his rating was corrected."

United States v. *U. S. Fidelity & Guaranty Co.*, U. S. Dist. Ct. E. D. N. Y., July 26, 1917, 244 Fed. 310.

MILITIA: National Guard; Veteran Corps of Artillery.

"Under Military Law (Consol. Laws, N. Y. c. 36), section 235, providing that no person belonging to the active militia of the State shall be arrested on any civil process while going to, remaining at, or returning from any place at which he may be required to attend for military duty, and section 5, defining the 'active militia' as consisting of the military forces known as the National Guard and the Naval Militia, the Veteran Corps of Artillery of the State of New York is neither a part of the National Guard nor of the Naval Militia, and a colonel commandant thereof, who had given a bond for the jail limits after his arrest on a body execution, was not entitled to a discharge from custody on the ground of his exemption from arrest, where he was not attending upon military duty, merely because the organization had engaged in certain preparedness work."

Andrews v. *Gardiner*, 166 N. Y. Supp. 933.

BULLETIN 72.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Civilian labor for police duty.

It was not contemplated in any appropriation made for either the Medical Department or the Quartermaster's Corps to pay for civilian labor to do police duty at a base hospital. Such duty should be done by the enlisted personnel.

Ops. J. A. G. 230.14, Nov. 12, 1917.

APPROPRIATIONS XXIV: Expense of enforcing regulation under sections 12 and 13 of the draft act.

The expense of conducting investigations and procuring evidence against bootleggers, drug users, and prostitutes for violations of the regulations under the draft act can not be paid from the appropriation for "Contingencies of the Army." Such expense should be borne by the Department of Justice.

Ops. J. A. G. 250.11, Nov. 26, 1917.

APPROPRIATIONS: Heat and light for Y. M. C. A. buildings.

The appropriation for furnishing heat and light for buildings erected at private cost under the act of May 31, 1902, is not available for the installation of heating and lighting fixtures in Y. M. C. A. buildings, but only to provide the consumable supplies necessary for heating and lighting same.

Ops. J. A. G. 412.1, Nov. 2, 1917.

APPROPRIATIONS: Heat and light for Y. W. C. A. hostess houses.

The appropriation for furnishing heat and light for buildings erected at private cost under the act of May 31, 1902, is not available for furnishing heat or light for hostess houses of the Y. W. C. A.

Ops. J. A. G. 680.32, Nov. 24, 1917.

ARMY I: Composition and organization.

There is no legal reason why enlisted men of the Regular Army, National Guard, National Army, or other divisions of the Army may not be regarded as interchangeable or why they should not all be carried on the same muster roll.

Ops. J. A. G. 220.33, Nov. 1, 1917.

ARMY I G.d: Medical Department Dental O. R. C.

While the Dental Corps is included in the Medical Department for administrative purposes, it has independent functions, and since the act of October 6, 1917 (Public 86, 65th Cong.), makes the personnel of that corps the same as that of the Medical Corps, except as to number per thousand, the Dental Corps is such a corps as should form the basis of an organization in the Officers' Reserve Corps. Subsection 2 of section 1 of Special Regulations 43, War

Department, 1917, may properly be amended so as to authorize the commissioning of officers in the Dental Reserve Corps of the Medical Department with the same grades and percentages within the grades as are permitted by law for the Medical Officers' Reserve Corps.

Ops. J. A. G. 211.25, Nov. 9, 1917.

ARMY: Organization—Supply sergeants.

Provisions for supply sergeants for any organization except Engineers, unless the term "supply sergeant" is qualified by other language, must be construed to have reference to supply sergeants of the class provided for companies, troops, and batteries, and not to battalion supply sergeants.

Ops. J. A. G. 322.56, Nov. 15, 1917.

ARMY FIELD CLERKS: Service prerequisite to allowances.

Under the Army appropriation act of August 29, 1916, Army field clerks after 12 years' service, 3 years of which shall have been on detached duty away from permanent station or on duty beyond the continental limits of the United States, or both, are entitled to certain allowances. In computing the 12 years' service, service as an enlisted man can not be counted. Service as headquarters clerk prior to the passage of the act and as an Army field clerk thereafter should be counted.

Ops. J. A. G. 241.1, Nov. 12, 1917.

ARTICLES OF WAR LIX, C, I: Jurisdiction of civil courts.

The civil authorities do not have the legal right to hold in arrest for misdemeanors persons in the military service, and it is their duty, upon request, to surrender such persons without trial to the military authorities. The Government is entitled to the services of its soldiers, and local courts should not be permitted to deprive the Government of such services. Courts-martial should be availed of exclusively for the trial of soldiers who offend against local or Federal liquor laws.

Ops. J. A. G. 250.11, Nov. 14, 1917.

ARTICLES OF WAR LXXXIII C: Limitations of sentences by summary courts.

The forfeiture of pay imposed by a summary court under the Fourteenth Article of War may be extended over a greater period than three months, provided that the amount forfeited does not exceed the amount of the soldier's pay for the three months immediately succeeding the sentence. As a matter of policy, it is unwise to protract unduly the period of forfeiture.

Ops. J. A. G. 250.41, Nov. 17, 1917.

CIVILIAN EMPLOYEES XI A: Resignation without due notice.

A civilian draftsman in the office of the Chief of Ordnance can not be required to continue in service against his will. But where he resigns and leaves without reasonable notice the record may show the fact, in order that the Civil Service Commission may apply its rule permitting a refusal to examine or certify an applicant who, within one year next preceding the date of his application, has resigned without due notice, to the embarrassment of the service.

Ops. J. A. G. 230.81, Nov. 8, 1917.

CLAIMS XII: Discipline IV, B—Fees for taking depositions.

Where the law of the place where a deposition is taken does not fix any fees therefor, the civil officer before whom a deposition is taken for use before a court-martial is entitled to reasonable compensation for his services.

Ops. J. A. G. 250.464, Nov. 15, 1917.

CLAIMS IV, XII, P: Damage incident to operation of Army.

Army appropriation act of May 12, 1917, provides for the payment of claims for damages to and loss of private property incident to the training, practice, and operations of the Army. Claims for damages incident to the operation of the Army are claims for damages which have been occasioned by an act done in connection with some movement or activity of the Army, and not in connection with mere maintenance. Hence, damages caused by a Government motor truck not used in connection with movement of troops, or by a laundry wagon of a post laundry, can not be paid out of this appropriation.

Ops. J. A. G. 153, Nov. 10, 1917; 152, Nov. 15, 1917.

CONTRACTS XV: By officer or employee with Government.

Under present statutory provisions (sec. 41 of Criminal Code; sec. 3 of act of Aug. 10, 1917) and Army Regulations (par. 521), an officer or employee in the military service is prohibited from acting as an officer or agent of the Government in making any contract or placing any order with a firm or corporation in which he may have a pecuniary interest, and from inducing or advising any authorized officer to make a contract or place an order with such firm or corporation. Otherwise, there is no objection to an officer or employee in the military service entering into contractual relations with the Government or owning an interest in a firm or corporation which enters into contracts with the Government.

Ops. J. A. G. 161.44, Nov. 6, 7, 1917.

CONTRACTS III: Emergency purchases.

All purchases of military supplies are now emergency purchases and are made without advertising. Paragraph 554, Army Regulations, requires a report of all such purchases exceeding $100 to be made to the Secretary of War, but there is no statutory provision, at present applicable, which requires such a report, for, so far as section 3709, Revised Statutes, applies, the Secretary of War has approved such purchases in advance by his order of April 12, 1917, and the act of June 12, 1906, has no operation when all purchases are emergency purchases.

Ops. J. A. G. 400.123, Nov. 26, 1917.

DESERTION III, C: Apprehension and delivery of deserters.

Civilian officers authorized by law to arrest offenders have power to apprehend and deliver deserters to the military authorities. When they have once arrested a deserter they may deliver him to any designated point, regardless of State or other jurisdictional lines.

Ops. J. A. G. 251.211, Nov. 16, 1917.

DESERTION VIII: Articles of War CIII—Limitations of action.

Paragraph 125, Army Regulations, and paragraph 44, Compilation of General Orders, 1915, are in conflict with the thirty-ninth

article of war, paragraph 148, subdivision d, Manual for Courts-Martial, 1917, regarding the statute of limitations affecting desertion. The latter are controlling. The statute begins to run on the date of the commission of the offense and continues to run until the date of arraignment of the accused. Its running is suspended during the period of any absence of the accused from the jurisdiction of the United States and any period during which by reason of some manifest impediment the accused was not amenable to military justice.

Ops. J. A. G. 251.25, Nov. 6, 1917.

DESERTION V, D: Reward—Reimbursement from deserter.

There is no statute requiring that the amount of the reward and other expenses incurred for the apprehension of a deserter be charged against the deserter. The requirement of paragraph 127, Army Regulations, may be waived or modified in the discretion of the Secretary of War.

Ops. J. A. G. 251.211, Nov. 1, 1917.

DISCIPLINE III, XIV, H: Convening authority of courts-martial—President as confirming authority.

Where the commanding officer of a tactical division serving within the territorial limits of a department is the accuser or prosecutor, the duty of ordering the court-martial devolves upon the War Department, since such tactical divisions have been withdrawn from the control of department commanders. And where an officer below the rank of brigadier general, belonging to such division, is sentenced to dismissal, the proceedings must go to the President for confirmation.

Ops. J. A. G. 250.42 Nov. 21, 1917.

DISCIPLINE IX: Procedure of courts-martial—Effect of irregularities.

The thirtieth article of war provides that when the court requires the legal advice of the judge advocate, it shall be obtained in open court in the presence of accused. Article 37 provides that errors of procedure shall not invalidate a sentence unless the proceedings show, in the opinion of the reviewing authority, that the rights of the accused have been substantially prejudiced. Failure to have accused present at a session where legal advice of the judge advocate was obtained is not material unless the substantial rights of the accused have been injured.

Ops. J. A. G. 250.45, Nov. 10, 1917.

EIGHT-HOUR LAW VI: Extraordinary emergency.

The employment by the Government of laborers and mechanics in excess of eight hours per day, except in cases of extraordinary emergency, is prohibited. Everything necessary to be done to assemble, care for, clothe, shelter, feed, arm, and train the soldiers of the National Army is of immediate and imperative necessity. And in the employment of labor to carry forward any or all of these purposes, and in declaring in connection therewith the existence of an extraordinary emergency, a very wide discretion must be lodged in those officers charged with the performance of these duties. When such extraordinary emergency is declared, report should be made promptly to the Secretary of War. (A. R. 731.)

Ops. J. A. G. 230.4423, Nov. 16, 1917.

ENLISTMENT II, C: Involuntary—Discharge of drafted men.

A district board has no authority to reopen the case of a man who has been inducted into the military service; but the local board may reopen his case upon permission or direction of the adjutant general of the State. If upon reopening the local board decides that the man should have been exempted, it will so notify the adjutant general, who will in turn notify the commanding officer at the mobilization camp. If a local board has, through error, sent a man to a mobilization camp pending his appeal, and he has been inducted into the military service, and thereafter he presents a certificate of exemption from the district board, he may be discharged by the division commander. Other than above stated, a commanding officer or division commander has no authority to discharge a man on the ground that he should have been exempted by the local board.

Ops. J. A. G. 324.72, Nov. 22, 1917.

ENLISTMENT II: Involuntary—Method of correcting rulings of local boards erroneously holding men for service.

The decisions of local boards upon claims for exemptions, including those based upon alienage, are conclusive. Where a man has been erroneously certified for service through error of law or nonculpable ignorance of the registrant, his case may be reopened by the local board upon request of the adjutant general of the State, either on his own motion or on motion of the military authorities or of the local board. Compiled rulings of Provost Marshal General, No. 12, M.

Ops. J. A. G. 014.311, Nov. 2, 1917.

ENLISTMENT II: Selective-draft act—Registration of slackers.

A person who willfully refuses to present himself for registration or to submit thereto, as provided in the selective-draft act, should be immediately registered and thereafter prosecuted for his misdemeanor. It would defeat the purpose of the act were the involuntary registration postponed until after service of the sentence imposed for the commission of the misdemeanor.

Ops. J. A. G. 324.71, Nov. 10, 1917.

ENLISTMENT II: Involuntary—Procedure before local boards under selective-draft act.

Local boards have no power under present presidential regulations to compel the attendance of witnesses, for the regulations do not contemplate the taking of oral testimony, but require the presentation of evidence by affidavit.

Ops. J. A. G. 013.26, Nov. 5, 1917.

ENLISTMENT II, A: Involuntary—Induction into service.

A drafted man was on October 6 assigned to a specified company, on October 13 was reported physically fit, on October 25 was rejected as physically unfit, and in the evening of October 25 died. *Held*, that his induction into the military service was complete before October 25, and that the rejection on October 25 did not, under the circumstances, operate as a discharge.

Ops. J. A. G. 220.46, Nov. 20, 1917.

ENLISTMENT I, B, 3: Statutory requirements—Eligibility of women.

The statutes governing enlistment in the Army do not authorize the enlistment of women. Consequently women may not be enlisted in the Ordnance Department.

Ops. J. A. G. 342, Nov. 14, 1917.

ENLISTMENT I, B, 3: Statutory requirements—Eligibility for Medical Enlisted Reserve Corps.

Only citizens of the United States or persons who have declared their intentions to become citizens of the United States are eligible for enlistments in the Medical Enlisted Reserve Corps. Japanese and Chinese subjects and citizens of the Philippine Islands are, therefore, ineligible.

Ops. J. A. G. 342.18, Nov. 24, 1917.

FIELD SERVICE: Army Nurse Corps—Commutation of quarters and subsistence.

Field service is a term of which the military mind has a fairly accurate conception, although it is not easily defined. Going to the professional books and the field-service regulations and the drill regulations, the term will be found to have reference not only to actual service in campaign or in action, but as well to an instructional service, which, though instructional, consists of the practice of those exercises and duties which are incident to campaign or action, of the application of tactical principles to assumed situations with respect to an imaginary, outlined, or represented enemy or a particular objective. As applied to the Nurse Corps, it means nothing more than the discharge of duties usually and ordinarily connected with and discharged by a nurse in a base hospital, which, as its name implies, is a hospital organized for actual and practical service with an army in the field. Accordingly, nurses in service at the base hospital of a cantonment or camp of the National Army are in field service and are not entitled to commutation of quarters, of heat or light, or of subsistence.

Ops. J. A. G. 246.84, Nov. 7, 1917, citing Ops. J. A. G. 6–124.4, July 6, 1914, and 24 Comp. Dec. 106.

GOVERNMENT AGENCIES, II, C: Limitations on business of post exchanges.

Post exchanges can not act as agents for private laundries, for a soldier's pay can not be stopped to satisfy a claim of a private person or business concern. There is no legal objection to the post exchange hiring the laundry done by a private laundry, thus becoming the real customer of the laundry, and in turn charging the men just and reasonable rates for having their washing done.

Ops. J. A. G. 486.3, Nov. 8, 1917.

INCOME TAX: Commutation of quarters, heat, and light.

Money received as commutation for quarters, heat, and light is income within the meaning of the income-tax law.

Ops. J. A. G. 012.22, Nov. 19, 1917.

INTOXICANTS: Selective-draft act—Regulations under sections 12 and 13.

The regulations of the President under section 12 of the selective-draft act prohibiting intoxicating liquors within prescribed distances

of military camps do not apply to permanent Regular Army posts. The regulations of the Secretary of War under section 13, prohibiting the keeping or setting up houses of ill fame, brothels, or bawdy-houses within prescribed distances of military camps do apply to Regular Army posts.

Ops. J. A. G. 220.46, Nov. 7, 9, 1917.

LINE OF DUTY II A, 1 b.

The presumption is that injuries received while a soldier is in the military service of the United States occur in the line of duty unless they were received while he was absent on furlough or was in a condition inconsistent with the performance of ordinary military duty; or unless they were received in consequence of willful neglect or immoral conduct of the injured. Therefore, where the evidence showed only that a soldier of good habits, on post guarding a railway bridge, was found about midnight lying unconscious about 30 feet out on the bridge, severely injured, and that he died therefrom, a finding that he met his death as the result of his own misconduct can not be sustained. So, a man absent on a five-hour pass, who in returning attempted to cross the track of a railway company by climbing between two cars blocking the crossing, and who was injured by the sudden starting of the train, was properly found to have been injured in the line of duty. So, a man absent from post on a 10-hour pass, who was run down by a railway train while walking along a railway trestle where soldiers frequently walked, was injured in line of duty where the evidence showed he was sober and that no proper warning of the approach of the train was given by lights or by bell or whistle.

Ops. J. A. G. 220.46, Nov. 7, 9, 1917.

MARINE CORPS: Detailed in Signal Corps.

A member of the Marine Corps detached for service with the Army is not, under the national defense act, eligible for detail in or attachment to the aviation section of the Signal Corps, and therefore can not receive the rating of junior military aviator.

Ops. J. A. G. 045.3, Nov. 20, 1917.

MILITARY INSTRUCTION II, B: Section 50, national-defense act.

Sections 43 and 50 of the national-defense act contemplated standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps at educational institutions of at least three hours per week per academic year, section 50 fixing the completion of two years' academic service by a member of the senior division of the Reserve Officers' Training Corps as a condition precedent to the right to be furnished commutation of subsistence during further instruction. Senate joint resolution 169, public 35, Sixty-fourth Congress, first session, required that in the interpretation of said section 50, men who had received a course of military training substantially equivalent to that prescribed by the regulations be given credit therefor. The proper interpretation of said section 50 as affected by said public 35 is that the requirement of two years' academic service can not be satisfied by double work for one academic year. (Ops. J. A. G. 350.3, Nov. 13, 1917.) But it is not required that the military training should all be acquired at the same institu-

tion. Consequently, a student may be entitled to advanced standing in military science where he has received military instruction substantially equivalent to that prescribed by the above-mentioned sections of the national defense act.

Ops. J. A. G. 354.17, Nov. 24, 1917.

MILITIA: Draft of National Guard officers.

An officer in the National Guard of Wisconsin called into the Federal service July 15, 1917, was ordered to report for duty and await orders, and did report for duty on July 21, 1917. By error of the military authorities he was not mustered into the service or assigned to the performance of any duties. *Held*, that he should be considered to have been accepted into the service of the United States as a member of the Organized Militia on July 21, 1917, and to have been drafted into the service of the United States on August 5, 1917.

Ops. J. A. G. 241.1, Nov. 24, 1917.

NATIONAL ANTHEM: Misuse of.

There is no Federal legislation regulating the playing of the national anthem, but some States have statutes forbidding playing it as part of a medley.

Ops. J. A. G. 007.11, Nov. 12, 1917.

OFFICE IV, A 2: Acceptance of other office.

There is no Federal statute forbidding an officer in the National Army from holding civil office. The prohibition of section 1222, Revised Statutes, applies only to officers of the Regular Army on the active list. As to others than officers of the Regular Army, the matter is one for State regulation.

Ops. J. A. G. 324.24, Nov. 21, 1917.

OFFICE III, A: De facto officer—Rights of.

The commission of a first lieutenant, Medical Reserve Corps, expired June 3, 1917, but the officer continued in service without a new commission and received pay and mileage as an officer until August 31, 1917. On September 9 he accepted a commission as captain, Medical Officers' Reserve Corps. *Held*, that from June 3 to September 9 he was a *de facto* officer and was entitled to keep the pay already received, but was entitled to receive no more pay except for the period beginning September 9, when he became a *de jure* officer.

Ops. J. A. G. 324.23, Nov. 14, 1917.

OFFICE IV, E 2: Dismissal of temporary and provisional officers.

The President has complete power to discharge any temporary officer of the Regular Army holding appointment under section 1 of the act of May 18, 1917. Commanding generals may appoint military boards to pass upon the capacity and fitness of such officer, whose findings may be laid before the President for such action as he sees fit. (Secs. 1 and 9 of act of May 18, 1917; subpar. 2 of par. 7, G. O. 76, C. S.) But the President may discharge provisional officers appointed under section 23 of the national defense act of June 3, 1916, only after due investigation, such as is provided for in paragraph 7, G. O. 76, C. S.

Ops. J. A. G. 324.4, Nov. 17, 1917.

OFFICE I, III A, 8a(4): Persons required to take oath of office.

Where positions are specifically provided for and specifically appropriated for by act of Congress, the holders of such position must take the oath of office prescribed by section 1757, Revised Statutes. No modified oath can be substituted therefor. But where positions are not so provided for, and the holders thereof are merely designated or appointed by the head of a department to perform the services and are paid out of a general appropriation for the expenses of such department, the taking of such oath can not be required.

Ops. J. A. G. 230.211, Nov. 19, 1917.

OFFICE III, B: Promotions in Medical Corps.

Section 10 of the national-defense act provides that persons hereafter commissioned in the Medical Corps shall be promoted to the grade of captain after five years' service in the Medical Corps and upon passing the examinations prescribed by the President for promotion. Public 86, Sixty-fifth Congress, provides that during the present emergency first lieutenants in the Medical Corps of the Regular Army and of the National Guard shall be eligible to promotion as captain upon such examination as may be prescribed by the Secretary of War. Construing these provisions together with section 114 of national defense act, it is held that all vacancies in the Medical Corps must be filled by permanent or temporary promotions, according to the character of the vacancy, of officers in the Medical Corps below the grade in which the vacancy exists, in order of seniority, subject to the required examinations. Temporary appointments can be resorted to only when possibilities of promotions by seniority have been exhausted.

Ops. J. A. G. 210.2, Nov. 16, 1917.

OFFICE III: Right of commanding officer—Effect of detail.

Assignments to commands and to statutory offices are governed strictly by law and regulations, but officers assigned to a command are subject to the will of the commanding officer and may properly be required to perform any duties he may direct them to perform (A. R. 746). And a division commander may detail one staff officer to perform the duties of another. Accordingly he may detail the inspector general of the division to duty as Acting Chief of Staff and detail a field officer, on duty with a regiment of the division, as acting inspector of the division. Such field officer is not thereby made an officer of the Inspector General's Department and can not perform any duties which are specifically required by statute to be performed by an officer of the Inspector General's Department.

Ops. J. A. G. 322.081, Nov. 8, 1917.

OFFICERS' RESERVE CORPS: Eligibility of members for boards of examination for rating of aviator.

Members of the Signal Officers' Reserve Corps promoted, appointed, detailed, or attached to the Aviation Section of the Signal Corps are, if they have the required experience, "officers of experience of the Aviation Section of the Signal Corps" qualified to be members of boards authorized to examine and certify to the qualifications of persons seeking the rating of aviators under section 6 of the act of June 24, 1917.

Ops. J. A. G. 334.1, Nov. 21, 1917.

PAY AND ALLOWANCES I, C 8; III, B 4: Allotments and satisfaction of private claims against enlisted men.

A soldier can not legally be deprived of any part of his pay for the satisfaction of a private claim, even for the support of his dependent parents. But he can make a voluntary allotment for such purpose. If he allots a portion of his pay for the support of his dependent parents, the Government will, under certain circumstances, make an additional allowance to the parents pursuant to the war risk insurance act of October 6, 1917.

Ops. J. A. G. 243, Nov. 3, 1917.

PAY AND ALLOWANCES II, A 1a: Commutation for heat and light.

An officer on duty in the field with his regiment is not entitled to have heat and light furnished for public quarters occupied elsewhere by his family.

Ops. J. A. G. 245.2, Nov. 8, 1917.

PAY AND ALLOWANCES I, A: De facto officers.

An officer of the Medical Reserve Corps who refused to accept a commission in the Medical Officers' Reserve Corps is not entitled to receive any pay for services as an officer after June 3, 1917, for since that date such officer has been at best but a *de facto* officer. Pay which a *de facto* officer has received he may keep, but he has no legal claim for any pay not yet received.

Ops. J. A. G. 324.23, Nov. 15, 1917.

PAY AND ALLOWANCES I, C: Gunner's pay.

Under section 1343, Army Regulations, 1917, a Coast Artillery man rated as a gunner and entitled to pay as such loses such rating and right to such pay on being transferred to the Field Artillery.

Ops. J. A. G. 242.142, Nov. 21, 1917.

PAY AND ALLOWANCES I, B 6: Longevity pay.

The act of June 18, 1878 (20 Stat. 150), providing for credit of full time of service for longevity pay has reference to service as an officer or enlisted man in the full military sense. Service in a training camp under an enlistment having for its sole purpose training for entrance into the Army of the United States as an officer and not binding the enlisted man to any service unless accepted as an officer can not be counted thereunder.

Ops. J. A. G. 241.12, Nov. 12, 1917.

PAY AND ALLOWANCES I, C: Marksman's pay, machine-gun battalion.

Under Army Regulation 1345 and paragraph 89, Small Arms Firing Manual as amended, an enlisted man, qualified as a marksman in the machine-gun company of an Infantry regiment, who has been transferred to a company in a machine-gun battalion, is entitled to the pay of a marksman, for he is still a member of an organization armed with the rifle.

Ops. J. A. G. 242.142, Nov. 2, 1917.

PAY AND ALLOWANCES I, C 5: Retirement II, A—Enlistment I, D.

The Army appropriation act of May 12, 1917 (Bulletin 30, p. 45, Pub. No. 11, 65th Cong. p. 39), provides for the restoration of status

in the Regular Army of an enlisted man who shall be discharged to accept a commission in the Officers' Reserve Corps, in the National Guard, or militia organization, or in any volunteer force, and who shall enlist within three months after the termination of his connection as an officer with that corps, etc. *Held*, that an enlisted man who is discharged from the Regular Army to accept a temporary commission in the Regular Army would not be entitled upon reenlistment to occupy his previous status in the Regular Army.

Ops. J. A. G. 342.06, Nov. 17, 1917.

PAY AND ALLOWANCES I, C: Sharpshooter's pay—Aero squadron.

The Tables of Organization for 1917 show an aero squadron to be an organization armed with a rifle, but these tables have no retroactive effect. A qualification as a sharpshooter continues for one year if no opportunity for requalification is presented within that year (A. R. 1345). Therefore an infantryman who qualified as a sharpshooter on July 13, 1915, and was on March 1, 1916, transferred to an aerial squadron, was not after March 1, 1916, entitled to pay as a sharpshooter, for from March 1, 1916, to July 13, 1916, an aero squadron was not an organization armed with a rifle.

Ops. J. A. G. 242.142, Nov. 15, 1917.

PAY AND ALLOWANCES II, A 2a: Transportation of officer's horse.

Private mounts of an officer may, upon change of station, be transported at public expense only when they are to be used by him at his new station in the public service.

Ops. J. A. G. 94–011, Oct. 31, 1917.

PAY AND ALLOWANCES II, A 3: Travel allowance to drafted men.

A drafted man discharged by competent authority is entitled to travel allowance to the place of acceptance for service. But men sent to camps under the draft act are not entitled to travel allowance to the place of reporting to the local board for military service.

Ops. J. A. G. 513.3, Nov. 22, 1917.

PAY AND ALLOWANCES II, A 2: Travel pay of reserve officers.

A reserve officer making an inspection of the records and accounts of the National Guard is entitled to mileage, but is not entitled to be reimbursed for actual expenses. Section 67 of the national defense act appropriates funds for the actual and necessary expenses incurred by officers and enlisted men of the Regular Army when traveling on duty in connection with the National Guard, but such funds are not available to pay expenses of reserve officers.

Ops. J. A. G. 245.6, Nov. 10, 1917.

RANK II, III: Lineal rank, how determined.

On May 15, 1917, several majors in different departments in the Quartermaster's Corps were promoted to be lieutenant colonels. The promotions were made according to seniority in the several departments to which the officers, respectively, belonged before the consolidation under the act of August 24, 1912 (37 Stat. 591), as required by section 3 of said act. The vacancies to which they were promoted were original vacancies. *Held*, that their lineal rank is not determined by section 1219, Revised Statutes, for the reason

that their advancement was by promotion and not by appointment, and that section applies to appointments and not to promotions.

Ops. J. A. G. 210.725–15, Nov. 19, 1917.

RANK D: Rank of noncommissioned officers.

A noncommissioned officer of the Regular Army is senior to a noncommissioned officer of the same grade in other forces irrespective of date of warrant The reason is that members of the permanent Military Establishment are assumed to be more experienced than those in the other forces which are more or less temporary.

Ops. J. A. G. 220.721, Nov. 20, 1917.

RETIREMENT II, A 4: Computing war service for.

The act of March 2, 1907, provides that in computing the 30 years' service for retirement of enlisted men, all service in the Army, Navy, and Marine Corps shall be credited. The act of March 3, 1899, governing service for retirement in the Navy, provides that active war service during the Civil or Spanish-American War shall be counted as double time. *Held*, that in computing the 30 years' service for retirement of an enlisted man in the Army, time actually served by him in the Navy should be computed by Navy standards and war service therein should be counted as double time.

Ops. J. A. G. 220.85, Nov. 5, 1917.

SELECTIVE-DRAFT ACT: Organization of regiments.

Under the third paragraph of section 1 of the selective-draft act, the President has authority to provide that Cavalry regiments organized provisionally as Field Artillery may retain their existing noncommissioned personnel until absorbed, but no special authority can be given to a single organization to do so.

Ops. J. A. G. 322.05, Nov. 17, 1917.

WAR: Censorship of mail in Canal Zone.

Under section 13 of the act of August 24, 1912, to provide for the government of the Canal Zone (37 Stat. 560, 569) the Governor of the Panama Canal in time of war has power, under authority given by the President, to censor all mail. The espionage act of June 15, 1917, did not repeal said section 13 of said chapter 390.

Ops. J. A. G. 000.73, Nov. 5, 1917.

OFFICERS: Promotions to fill temporary vacancies in the Regular Army.

[First indorsement.]

82–121.

War Department, J. A. G. O., September 4, 1917.—To The Adjutant General.

1. By informal indorsement you have referred to this office a request for an opinion as to the proper construction to be given that part of section 8 of the act of May 18, 1917, considered in connection with section 114 of the national defense act, governing the subject of promotions to fill temporary vacancies in the Regular Army which occur by reason of the appointment of regular officers to higher grades in the National Army. Section 8 of the act of May 18, 1917, reads in part as follows:

"Vacancies in all grades in the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section one hundred and fourteen of the national defense act approved June third, nineteen hundred and sixteen; and officers appointed under the provisions of this act to higher grades in the forces other than the Regular Army herein provided for shall not vacate their permanent commission nor be prejudiced in their relative or lineal standing in the Regular Army."

Section 114 of the national defense act provides as follows:

"In time of war the temporary vacancies created in any grade not above that of colonel among the commissioned personnel of any arm, staff corps, or department of the Regular Army, through appointments of officers thereof to higher rank in organizations composed of members taken from the National Guard, shall be filled by temporary promotions according to seniority in rank from officers holding commissions in the next lower grade in said arm, staff corps, or department, and all vacancies created in any grade by such temporary promotions shall be in like manner filled from, and thus create temporary vacancies in, the next lower grade, and the vacancies that shall remain thereafter in said arm, staff corps, or department and that can not be filled by temporary promotions, as prescribed in this section, may be filled by the temporary appointment of officers of such number and grade or grades as shall maintain said arm, corps, or department at the full commissioned strength authorized by law."

2. In construing the foregoing provisions of the statute it is necessary to determine the force and effect to be given to that clause wherein it is stated that officers of the Regular Army, appointed to higher grades in forces other than the Regular Army, "shall not vacate their permanent commissions or be prejudiced in their relative or lineal standing in the Regular Army"; and also to that clause wherein it is stated that temporary vacancies created in any grade not above that of colonel among the commissioned personnel of any arm, staff corps, or department of the Regular Army through appointment of officers thereof to higher rank in forces other than the Regular Army—"shall be filled by temporary promotions according to *seniority in rank from officers holding commissions in the next lower grade* in said arm, staff corps, or department."

3. It is impossible to read this statute without grasping as its true significance the fact that it was intended to enable the War Department to raise and properly officer large armies such as those in process of formation at the present time. To accomplish this purpose authority is extended to commission officers of the Regular Army temporarily in such other forces as may be raised, and its purpose to protect officers so commissioned in their permanent commissions and to prevent them from being prejudiced in their relative or lineal standing in the Regular Army is unmistakable. Beyond this it was not required, however, that the department waste its time and effort in dealing with questions of rank and precedence such as would be involved if an effort were made to prevent minor variations in relative or lineal standing as between officers who choose to remain in the

Regular Army and to serve under their commissions therein, and those who choose to accept higher commissions in forces other than the Regular Army. If such a course of procedure were to be adopted by the War Department, it is perfectly evident that so many changes and disturbances among the commissioned personnel of the several forces would be required to preserve the relative and lineal standing of officers of the Regular Army that confusion would inevitably follow, efficiency would be impaired, and the usefulness of armies subordinated to the adjustment of rank and precedence.

4. From what has just been stated it appears to be desirable to adopt a construction, if such can be consistently done within the fair meaning and intendment of the statute, which will promote the highest efficiency of the service. Assuming, as we must, that this was the purpose of the act, it is difficult to believe that Congress could have intended, by the language used, not only to protect regular officers in their permanent commissions but to protect them as well from being prejudiced, even temporarily, in their relative or lineal standing by preventing such of them as accept commissions in forces other than the Regular Army from being temporarily ranked by officers of lower permanent rank in the Regular Army, but who are advanced therein by temporary promotions. On the other hand, it accords with this assumed purpose of the law to hold that Congress intended merely to protect officers of the Regular Army in their permanent commissions therein and, as an incident of such protection, to prevent them from being prejudiced in their relative or lineal standing as members of the permanent establishment only. If it be contended that this view might result in temporarily giving a junior who had been advanced by temporary promotion in the Regular Army higher rank than his senior who has accepted a commission in forces other than the Regular Army, the answer is that this is a risk the senior assumed when he accepted a higher commission in such other forces, a risk which the statute did not protect against and which the War Department, as pointed out above, could not well assume to avoid without endangering the ultimate success of the great effort upon which it is now embarked.

5. When an officer of the Regular Army leaves his place in the permanent establishment to accept temporarily a higher rank in another army, it must, I think, be assumed that his commission in the Regular Army is temporarily in abeyance. While serving under a different commission in some other army, he does not and can not function under his commission in the Regular Army. He is not, therefore, within the meaning of the statute, an officer "holding a commission in the next lower grade" of his arm, staff corps, or department, for, as just shown, he has ceased to function therein and is temporarily as much absent therefrom as though he really formed no part of such arm, staff corps, or department. The statute can properly be given full force and effect by construing the language just quoted to mean that promotions to temporary vacancies caused through the appointment of officers of the Regular Army to higher rank in forces other than the Regular Army shall be filled by temporary promotions according to seniority of the officers who remain in the Regular Army and are, at the time of such vacancies, serving under their commission therein. Officers not serving under their commissions in the Regular Army would thus be temporarily passed

over and, instead of being promoted temporarily to higher vacancies in their own arm, staff corps, or department, they would be left to serve under the higher commissions which they are temporarily holding in some other army. Such is the clear intendment of the statute and such, I think, must have been the purpose of Congress in enacting it.

6. It is impossible to foresee and discuss every contingency that may arise in the administration of this law under the construction which I have just indicated will be the proper one to adopt; but it is believed that the difficulties under this plan will be few in comparison with those that would inevitably arise under the alternative construction suggested and that none of those that do arise will prove to be insuperable. It may be proper, however, in addition to what has been stated, to refer to the matter of permanent promotions in the Regular Army. When an officer becomes entitled to a permanent promotion in the Regular Army he must, of course, accept the same. If he is serving as a colonel, let us say, in the National Army and becomes a permanent colonel in the Regular Army, he should ordinarily be continued in service in the National Army. This could involve no impairment of his rank, since his commission as a colonel in the National Army would antedate his commission as a permanent colonel in the Regular Army. If, however, an officer is serving as a temporary colonel in the Regular Army and is promoted to be a permanent colonel therein, it may well be that his commission as a permanent colonel will be subsequent to that held by other temporary colonels who are his juniors in his arm, staff corps, or department. It is my view that the statute intended to protect officers of the Regular Army against a contingency of this kind when it provided that they should not be "prejudiced in their relative or lineal standing in the Regular Army." I think it would be a fair construction of this language to hold that Congress intended that no officer of the Regular Army, serving under a commission therein, shall be required to serve with lower rank than that held by a junior in his arm, staff corps, or department and who is also serving under a commission therein. This situation can be obviated by giving the officer who receives the permanent promotion a constructive date of rank as of the date of the temporary commission which he vacates to accept his permanent commission. This may be found necessary to maintain him in his proper relative or lineal standing in the Regular Army. Cases of this kind will, it is believed, be few in number and can be taken care of by administrative action without difficulty. This construction of the statute and the suggested administrative action thereunder would amply protect officers of the Regular Army in so far as Congress intended to extend protection, and would leave the question of relative rank as between officers serving under commissions in some other army, where Congress, I think, intended to leave it to the fortunes of war and the incidents of service.

7. It is, therefore, the opinion of this office that promotions to vacancies in the Regular Army caused by the appointment of officers thereof to higher grades in forces other than the Regular Army should be filled by promotion, according to seniority, of officers who, at the date of such vacancies are serving under commissions in the next lower grade of the arm, staff corps, or department in which the vacancies occur.

OFFICERS: Effect of acceptance of commissions in one of the component forces of the Army of the United States upon a commission held in another force of said Army.

[Memorandum for The Adjutant General.]

AUGUST 30, 1917.

64-311.

Subject: Effect of acceptance of commissions in one of the component forces of the Army of the United States upon a commission held in another force of said Army.

1. In your letter of August 22, 1917, you ask my opinion—

"as to whether or not the acceptance of a commission in one of the armies of the United States operates to vacate a commission held in one of the other armies where such commission is not protected by statute, such as one held in the Regular Army."

In the first place, it is pertinent to invite your attention to the fact that there is but one Army of the United States in the general sense—"the Army of the United States," which consists of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard drafted into the service of the United States, and the additional forces provided for in the National Army act (the National Army act of May 18, 1917, and sec. 1, national defense act). Whoever holds a commission in any of these component forces is an officer in the Army of the United States.

2. The statutes expressly provide that officers of the Regular Army (which includes both active and retired officers) may accept commissions in the National Guard without vacating their commissions in the Regular Army (sec. 100, national defense act), and all the volunteer acts have carried, and do still carry, the same provision. See the volunteer act of 1898 (30 Stat. 360, 363); the volunteer act of March 2, 1899 (30 Stat. 977, 980); section 1, act of May 28, 1898 (30 Stat. 421); and the existing volunteer act of April 25, 1914 (38 Stat. 346, 350). The present National Army act, which provides an additional force—the so-called National Army—supplanting the time-honored Volunteer Army, also provides that—

"Officers appointed under the provisions of this act to higher grades in the forces, other than the Regular Army, herein provided for shall not vacate their permanent commission nor be prejudiced in their relative or lineal standing in the Regular Army."

Thus it is that Congress has gone to great pains to authorize the appointment of Regular officers to the National Guard drafted into the Army of the United States, to the National Army, and to the Volunteer Army whenever such there shall be, and to protect under such circumstances their Regular commissions. In my opinion, the protection furnished ends with the statute; and if an officer of the National Guard component, or the National Army, or of the Reserve Corps, accepts a commission in any other component force, he thereby vacates his former commission.

3. In my judgment, one may not hold two offices in the same military establishment without specific legislative authority therefor. This may be regarded as inferentially established by the fact that Congress has deemed it necessary to protect the commission of an officer in the regular service when appointed to any other force

in the Army of the United States. The incompatibility existing between two offices in the same military establishment is obvious. It is settled that two offices are incompatible when a performance of the duties of the other or when the holding of two is contrary to the policy of the law. *Crosthwaite* v. *U. S.* (30 Ct. Cls. 300; 22 Ops. Atty. Gen. 237; 20 Ops. Atty. Gen. 427); *Webster* v. *U. S.* (28 Ct. Cls. 25); *Graham* v. *U. S.* (29 Ct. Cls. 404). Obviously, an officer of the National Army, for instance, may not perform the duties of an officer of the National Guard, or of a reserve officer, and his own as well; and the same is true of the officers of the several forces. For example, a reserve officer has his functions established by law. As such he may be used for certain specified purposes. Obviously, he can not perform the functions which inhere in his office as a reserve officer and at the same time those which inhere in office in any of the other forces. Nor, with regard to his inactive status, can it be said that he stands available so to be used in both capacities. Any other view would result not only in grave inconsistencies, but positive injury to the military service. Holding dual or multiple commissions in the same establishment can but frustrate the patent policy of the law.

4. General principles point the way to this conclusion, and while the precedents are few they lead in the same direction. It has been held by the Attorney General that the office of colonel is inconsistent with that of major in the Army (20 Ops. 428). And so it has been held of an engineer and a paymaster in the Navy (*Webster* v. *U. S.*, *supra*) and of an assistant medical referee in the Pension Bureau and an examining surgeon (*Graham* v. *U. S.*, *supra*). In *Webster* v. *U. S.*, *supra*, the court seemed to rest its reason for its holding of incompatibility upon the statement that they were "two offices in the same service."

It is certain also that one holding both commissions would not receive the pay of both offices, and this in itself is an evidence of incompatibility (20 Ops. Atty. Gen. 428).

5. It is my opinion, therefore, except in so far as the statute gives express protection, an officer in one of the component forces of the Army of the United States may not hold a commission in another such component, and that if he be appointed to any such second office he thereby vacates his former commission.

DECISIONS OF COMPTROLLER.

PAY AND ALLOWANCES I, B 6: Computing service for longevity pay.

Commissioned officers of the Regular Army who have had State (not Federal) service in the militia or National Guard are not entitled to count such service in the computation of their longevity pay. Officers of the National Guard drafted into the military service of the United States under section 111 of the national defense act of June 3, 1916, are entitled to have counted all legal service which they have had in the Organized Militia or National Guard and in the Army and Navy, if any, in computing their longevity pay.

Opinion of Nov. 19, 1917.

PAY AND ALLOWANCES II, A 3: Travel allowance of Regular Army reservist on discharge.

Upon the discharge of an enlisted man of the Regular Army Reserve, recalled to active service, he is entitled to travel allowance from the place of his discharge to his home; that is, to the place from which he was furnished transportation when called to active duty.

Opinion of Nov. 16, 1917, affirming opinion of J. A. G.

NOTES ON THE ADMINISTRATION OF MILITARY JUSTICE.

AMENDMENT OF RECORD.

The reviewing authority in a recent case returned for correction attempted to amend the record by attaching thereto certificates of the president of the court and the trial judge advocate to the effect that the members of the court and the judge advocate were sworn.

In another case, returned for correction, the president of the court interlined and initialed a statement to the effect that the accused was asked if he objected to any other member of the court, to which he replied in the negative.

Proper correction of both of the errors referred to was essential to the validity of the proceedings. It has been decided in a number of cases that amendments "can only be made by the court when duly reconvened for the purpose, and when made must be the act of the court as such." (Dig. Ops. J. A. G. 1912, 523.) Paragraph 364 of the Manual for Courts-Martial, 1917, plainly describes the method of correcting clerical and other errors in court-martial records, and failure to comply therewith unnecessarily increases the work of this office as well as the expense of administering military

COMMENT UPON EVIDENCE IN OPEN COURT BY MEMBER OF COURT.

After the trial judge advocate had concluded his remarks and just before the court was closed for findings in the trial of a soldier charged with desertion and found guilty of absence without leave, the president of the court made the following statement:

"To my mind it is an aggravated case of overindulgence in whisky in a young man whose future, I fear, is very black."

This irregularity was of such a grave nature that had not the accused freely admitted his absence without leave on the witness stand the finding and sentence of the court must have been set aside. The president of the court, or any member thereof, has no right to comment in open court upon the evidence adduced at the trial.

PROCEEDINGS IN REVISION—CONSTITUTION OF COURT.

In a recent case it was necessary for the reviewing authority to return the record of trial of a soldier convicted of larceny to the court, with directions to reconvene and correct certain errors therein, which was done. Upon examination of the record in the office of the Judge Advocate General it was found that the proceedings in revision were invalid, for the reason that a member of the court absent at the trial participated therein. The record was returned to the reviewing authority, who then issued an order setting the sentence aside as being

invalid. No reason is apparent for not again reconvening the court in order that it might correct the record in proper proceedings in revision. By this action of the reviewing authority the trial was rendered ineffectual and a soldier convicted of a crime involving moral turpitude unnecessarily escaped merited punishment.

PUNISHMENT FOR VIOLATION OF LIQUOR REGULATIONS.

In a recent case, in addition to being convicted of desertion in time of peace, a soldier pleaded guilty to selling liquor to another soldier in uniform, in violation of section 12 of the act of May 18, 1917. The court imposed a sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for 18 months, which was approved by the reviewing authority, and which was adequate punishment only for the crime of desertion. The court apparently ignored the gravity of the offense of selling liquor to a soldier and failed to punish properly a self-confessed bootlegger. Any person who now furnishes liquor to a soldier impairs the military forces of the United States at a time of national emergency, when the country is straining every nerve to build up and increase the efficiency of its Army. Drastic punishment should be meted out in no uncertain manner to this class of offenders.

TESTIMONY OF MEMBER OF COURT.

During the trial of a recent case a member of the court, without being excused as such, testified as a witness upon request of and ostensibly, as stated by the president thereof, "for the benefit" of the court, his testimony being adverse to the interests of the accused. In practical effect he was a witness for the prosecution, and, in view of the provisions of the eighth article of war, the Judge Advocate General held that his action in testifying and thereafter participating in the proceedings of the court rendered the findings and sentence invalid.

COURT DECISIONS.

EVIDENCE: Federal price list.

The State of Washington sued a militia captain and his bondsmen on account of his failure to account for certain military equipment received prior to 1913. The defense was a general denial and an affirmative plea that defendant had demanded a board of survey to inquire into the alleged shortage, which demand had been arbitrarily refused. At the trial the only evidence offered as to the value of the equipment was the Federal price list of equipment and supplies revised February 1, 1913. *Held*, that plaintiff was properly nonsuited, for the 1913 price list was no evidence of the value of the goods received long prior to 1913, and consequently no verdict for more than nominal damages could have been returned.

State v. *Buckley*, 167 Pac., 1087, Supreme Court of Washington.

JURISDICTION OF CIVIL AND MILITARY COURTS.

On July 11, 1917, a member of the National Guard, who had prior to that time been mustered and sworn into the service of the United States, shot and killed a policeman in the city of Newport, Ky. He was arrested by a sergeant of his company, was committed by the

county judge upon an examination, and was indicted by the grand jury on the charge of murder. His commanding officer filed a petition of habeas corpus praying that the prisoner be delivered to the military authorities for trial by a court-martial on the charges preferred against him. *The court held*, that while the civil courts have priority of jurisdiction over capital crimes committed by soldiers in time of peace, the military authorities in time of war, having concurrent jurisdiction with the civil authorities for crimes committed in a loyal State, have the prior right. After reviewing the authorities, Judge Cochran said:

"It is clear, therefore, that under the Articles of War the civil authorities in time of war have no right to withhold a soldier accused of a crime from the military authorities or to demand him from them in order to try him for an offense against the criminal laws of the land."

He held also that in this case the military authorities had not waived any of their rights by the sergeant's act of delivering the prisoner to the county jail.

In re King, United States District Court, Eastern District of Ohio. Case and Comment for November, 1917, p. 495.

SELECTIVE DRAFT ACT: Interpretation, nondeclarant aliens.

Relator was brought before the court on a writ of habeas corpus. He was a citizen of Russia, had never declared his intention of becoming a citizen of the United States, was drafted for military service and ordered to report, and was arrested by the military authorities for not reporting. He received the usual notices; he never made any claim for exemption on ground of alienage in the manner prescribed by the regulations. He alleged that he had made certain informal claims and failed to make formal claim by reason of assurances given him by members of the local board that, being an alien, he need not trouble himself further. This was denied by members of the local board. After the time for filing exemption claims had expired he made formal claim. The court stated the question at issue to be this:

"Is a person who failed to claim exemption on the ground that he was a nondeclarant alien, and who now asserts (without contradiction) that he is such an alien, properly in the custody of the military authorities?"

The question is answered in the affirmative on the ground that the relator was not denied a fair hearing and the local and district boards acted in strict accordance with the procedure laid down by the regulations. The following excerpt from the opinion is of special interest:

"The remaining question is whether the local board wholly lacked jurisdiction. It is contended because nondeclarant aliens are exempted from the draft that no obligation was placed upon relator affirmatively to present his claim for exemption, and this is but another way of stating that by virtue of the act itself relator was automatically exempted.

"It must be conceded at the outset that Congress had the power to subject all persons to the draft whether citizens or aliens.

"The question, then, is whether from the structure of the act it was the intention of Congress that only those who claimed exemption

should in proper cases be exempted, or whether those entitled to exemption could disregard the procedure provided for by the act and the regulations and show *aliunde*, as here, that they fell within one of the statutory exempt classes.

"The whole plan of the act is undoubtedly to require that those who claim exemption shall affirmatively present their claim to the appropriate body so that that body can determine as a fact whether the person falls within the exempted classes. When, therefore, no such claim is presented and the proceedings of the local and the district boards are regular in every respect, the court can not go outside of the proceedings of the boards to determine independently something which the act required should be determined by these boards."

United States ex rel. Koopowitz v. *Finley.* United States District Court, Southern District of New York, Mayer, judge, Nov. 3, 1917.

The petition alleged that petitioners were nondeclarant aliens and subjects of Italy, and by treaty not liable to military service here. There were no allegations that the draft boards had acted arbitrarily or had departed from the procedure prescribed by the draft regulations. *Held*, that the courts can not under the facts set forth in the petition interfere with the findings of the draft boards by resort to the writ of habeas corpus.

United States ex rel. Troiani v. *Heyburn.* United States District Court, Eastern District of Pennsylvania, Dickinson, judge, Sept. 10, 1917.

SELECTIVE DRAFT ACT: Interpretation, declarant aliens.

The petitioner was a citizen of the Kingdom of Spain, who had filed his declaration of intention to become a citizen of the United States. He was arrested off the shore of Mexico by a United States war vessel and detained under process for evading the selective draft act. He made application for a writ of habeas corpus, claiming that when arrested he was on his way to Spain, and that he was not subject to the draft act on account of the provisions of the treaty with Spain by which its citizens are exempt from compulsory military service in the United States forces. *Held*, that the petitioner was subject to draft; that the provisions of the draft act, when in conflict with prior treaty stipulations, prevail over them, and that the order to show cause why a writ of habeas corpus should not issue be discharged and the writ denied.

In re Victor Larrucea, United States District Court, Southern District of California, Southern Division, Bledsoe, judge.

BULLETIN 75.

OPINIONS OF JUDGE ADVOCATE GENERAL.

ABSENCE II, B: Expense of returning soldiers absent without leave.

There is no general authority for payment of expenses incurred by civil authorities for the arrest and return of soldiers absent without leave who are not deserters. In exceptional cases the Secretary of War may authorize the payment of such expenses from the appropriation, "Contingencies of the Army."

Ops. J. A. G. 242.42, Dec. 26, 1917.

ARMY: Composition and organization: Office III, C; Assignment of reserve officers.

In time of actual or threatened hostilities the President may order officers of the Officers' Reserve Corps to temporary duty with the Regular Army in grades that can not be filled by promotion, or to duty, permanent or temporary, in authorized positions in volunteer or other organizations, which include the National Guard drafted into the Federal service or the National Army.

Ops. J. A. G. 210.33, Dec. 15, 1917.

ARMY I: Composition and organization.

Regiments of Cavalry organized provisionally as Field Artillery under the act of October 6, 1917 (Public, 89, 65th Cong. 1st sess.), cease for the time being to be Cavalry regiments. An officer of such a reorganized regiment should wear the insignia and sign his rank as of the regiments of Field Artillery in which he is serving.

Ops. J. A. G. 421.7, Dec. 1, 1917.

ARTICLES OF WAR LXIII: DISCIPLINE VIII: American Red Cross.

American Red Cross officials serving with United States base hospitals in France are "persons accompanying or serving with the armies of the United States in the field" within the meaning of the Second Article of War, and are therefore subject to the military jurisdiction of the United States. The same is true of the personnel of American Red Cross hospitals in France which serve soldiers and civilians or which serve civilians only, provided that they have been recognized formally or informally by the Army of the United States.

Ops. J. A. G. 250.4, Dec. 21, 29, 1917.

ARTICLES OF WAR CVI, CVII: Construction of present forty-eighth article of war.

Both the legislative history of the forty-eighth article and its unambiguous language require the interpretation that a sentence of dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the territorial department or of the territorial division.

Ops. J. A. G. 210.81, Dec. 8, 1917.

ARTICLES OF WAR LXXXII, B: DISCIPLINE III; Power of commanding officer of base hospital to convene special and summary courts-martial.

The commanding officer of a base hospital is the commanding officer of a "place where troops are on duty" within the meaning of the ninth and tenth articles of war, and therefore has power to convene special and summary courts-martial.

Ops. J. A. G. 250.42, Dec. 26, 1917.

CIVIL AUTHORITIES I, B: Procedure where soldier is necessary witness in a civil proceeding.

There is no Federal law by virtue of which a continuance may be secured as of right in a proceeding before a civil court by reason of absence of a necessary witness in the military service. Depositions of such witness may be taken upon application to the commanding officer under whom he is serving where the circumstances are such that the military duties of the witness will not be interfered with. The taking of depositions of men serving in the expeditionary forces abroad ought not to be permitted.

Ops. J. A. G. 013.26, Dec. 18, 1917.

COMMUNICATIONS II: Franking privilege for applications for family allowances and insurance.

In forwarding applications for family allowances and for insurance, officers may use penalty envelopes; but these may not be registered without payment of the registration fee.

Ops. J. A. G. 311.17, Dec. 21, 1917.

DESERTION V, B, C: Amount of reward for delivery at place other than nearest military post.

Where a deserter is delivered to the military authorities at a place other than the nearest military post, as, for example, to the local draft board or to a detachment or guard sent to receive him, the person so delivering him is entitled to a reward of $50 less the estimated cost of delivering him to the nearest Army camp or post.

Ops. J. A. G. 251.211, Dec. 4, 7, 1917.

DISCHARGE XX: Discharge of National Guard officers.

An efficiency board convened pursuant to section 77 of the national defense act completed its action prior to August 5, 1917, recommending the discharge of certain officers of the Illinois National Guard, but no order was issued thereon until after the draft of said officers on August 5, 1917.

Held, That no valid order could be issued thereon, and that said officers may be discharged from service only under section 9 of the selective draft act. The discharge may be made by the President for any cause which, in his judgment, would promote the public service; or it may be made by the President after determination by a board of officers that the officers in question are unfit.

Ops. J. A. G. 210.81, Dec. 12, 1917.

DISCIPLINE XIV, C: Construction of paragraph 376, M. C. M., 1917.

Under paragraph 376 of the Manual for Courts-Martial, 1917, the reviewing authority is not required to write out in his own hand the

order of approval, disapproval, or other action taken upon proceedings of courts-martial. It is sufficient if he signs such action with his own hand.

Ops. J. A. G. 250.42, Dec. 26, 1917.

DISCIPLINE VIII, G: Jurisdiction of courts-martial as to offenses committed prior to enlistment.

Cases arising under the eighty-first article of war (relieving, corresponding with, or aiding the enemy) or under the eighty-second article of war (spies) may be tried by courts-martial regardless of whether the offenders were subject to military law at the time the offenses were committed. And under the fifty-fourth article of war a soldier may be tried for fraudulent enlistment, though the act was committed prior to his induction into the military service. But in the absence of statute the general rule applies that a court-martial has no jurisdiction of an offense committed prior to the entry of the offender into the military service.

Ops. J. A. G. 250.4, Dec. 20, 1917.

DISCIPLINE VIII, G: Jurisdiction of courts-martial over prisoners of war.

General courts-martial have jurisdiction to try prisoners of war for military offenses and for offenses of a civil nature. It is inadvisable under the provisions of the present Manual for Courts-Martial (see par. 3(a)) to resort to a provost court or to a military commission in such cases.

Ops. J. A. G. 383.6, Dec. 27, 1917.

DISCIPLINE XII, B, 3 e: Sentence of forfeiture of pay—Effect upon allotments.

That portion of pay required to be allotted by the provisions of Article II of the war risk insurance act of October 6, 1917, is not subject to forfeiture by sentence of a court-martial, but any portion voluntarily allotted is subject to such forfeiture. A sentence imposing forfeiture of a part of pay means forfeiture of the specified part of that portion of pay not covered by compulsory allotment.

Ops. J. A. G. 243, Dec. 17, 1917.

ENLISTMENT I, A, 3, 8, B: Persons authorized to take enlistments.

An enlistment is accomplished by executing the contract of enlistment and taking the oath of allegiance; but this can be done only when authorized by some person acting for the Government of the United States. Otherwise any person authorized to administer an oath might accept recruits and bind the Government. But where a person not regularly enlisted has been treated and recognized as an enlisted man by the Government, he may be properly enlisted and his enlistment dated back.

Ops. J. A. G. 342, Dec. 15, 1917.

ENLISTED RESERVE CORPS: Call to service.

A member of the Enlisted Reserve Corps who is unconscious at the time of receipt of call to active duty and remains unconscious thereafter till death is never brought into the military service.

Ops. J. A. G. 220.46, Dec. 5, 1917.

GOVERNMENT AGENCIES III: Distribution of company funds of disbanded organizations.

Where an organization's post exchange accumulated a fund which was not distributed pro rata among its members upon the disbanding of the organization, and its former members are no longer in the service as enlisted men but are in the service as officers, the fund should be covered into the United States Treasury as "Miscellaneous receipts," for officers are not entitled to participate in the benefits of a company fund.

Ops. J. A. G. 123.61, Dec. 22, 1917.

GOVERNMENT AGENCIES III: Distribution of company fund upon reorganization.

Where upon reorganization of a company a percentage of the enlisted men thereof are transferred to another organization, a pro rata share of the company fund should be transferred to the organization to which they are transferred.

Ops. J. A. G. 123.7, Dec. 20, 1917.

GOVERNMENT AGENCIES II: Liability of post exchange to war-revenue tax.

Tobacco sold by a post exchange is subject to the war-revenue tax imposed by section 403 of the act of October 3, 1917 (Public, No. 50, 65th Cong.).

Ops. J. A. G. 012.23, Dec. 6, 1917.

OFFICE III, A, B: Appointments and promotions in Porto Rico regiments.

The Porto Rico Regiment of Infantry is a component part of the Regular Army. Consequently, temporary vacancies therein resulting from the appointment of officers to higher grades in the forces other than the Regular Army are to be filled, as provided by section 8 of the act of May 18, 1917, by temporary promotions and appointments according to seniority in rank of officers holding commissions in the next lower grade in said regiment.

Ops. J. A. G. 322.81, Dec. 1, 1917.

OFFICE IV, E, 2: Dismissal of provisional officers.

Under section 1 of the selective draft act the President is given power to terminate provisional appointments whenever it is determined that the officer is unfit for permanent appointment. G. O. 76, W. D., June 26, 1917, lays down the rules prescribed by the President for determining the fitness of such officers. The procedure therein prescribed must be followed.

Ops. J. A. G. 210.81, Dec. 1, 1917.

OFFICE IV, A, I: Effect of acceptance of commission in Officers' Reserve Corps by drafted National Guard officer.

An officer of the National Guard of a State was drafted and thus became an officer in the National Guard component of the Army of the United States. Thereafter he accepted a commission in the Officers' Reserve Corps.

Held, that he thereby vacated his commission in the National Guard component of the Army.

Ops. J. A. G. 324.24, Dec. 29, 1917.

OFFICE III, A, B: Qualifications for appointment and promotion in Medical and Dental Corps.

The act of October 6, 1917, repeals section 10 of the act of June 3, 1916, in so far as it requires 24 years' service as a qualification for major in the Dental Corps and limits the number of majors to 15. The same act makes first lieutenants in the Medical Corps of the Regular Army and National Guard eligible to promotion as captains upon examination prescribed by the Secretary of War. The Secretary need not act in the premises unless he so desires.

Ops. J. A. G. 321.6, Dec. 5, 1917.

OFFICE III, A, B: Temporary promotions in Regular Army.

The term "temporary promotion," as used in the National Army act of May 18, 1917, and in section 114, national defense act of June 3, 1916, contemplates promotion as ordinarily understood in military legislation. Temporary promotion by seniority contemplates that the appointing power shall be satisfied that the officer about to be promoted is qualified. No officer is entitled to promotion regardless of his qualifications. Failure of an officer to discharge the duties of a higher grade in the National Army may and should be regarded by the President as satisfactory evidence of his disqualification to perform the duties of the same grade in the Regular Army. It is within the power of the War Department to prescribe how long an officer who has demonstrated his disqualification for higher command in the National Army shall remain ineligible for temporary promotion in the Regular Army and upon what conditions he shall become eligible for such promotion.

Ops. J. A. G. 210.33, Nov. 27, 1917.

OFFICE III, C: Transfer of officer to another component.

All officers, except those of the Regular Army and those of the Officers' Reserve Corps, whether they have been commissioned in the so-called National Guard component or in the additional force called the National Army, have similar status and obligations and are transferable from one component to another. Regular Army officers, however, may not be transferred to the other forces, but they may be appointed thereto in the manner prescribed by statute and not otherwise. Officers of the other forces can not become officers of the Regular Army except by original appointment as the statute prescribes. Officers of the Reserve Corps have a fixed, limited tenure of office and a specified use. These incidents prevent homogeneity with the other forces. Consequently, a National Guard officer can not be transferred to the Officers' Reserve Corps without a prior return to a civilian status.

Ops. J. A. G. 210.33, Nov. 27, 1917.

OFFICE IV, A, 1 a: Vacation of office by accepting other office.

An acceptance of a Regular Army commission, whether permanent or temporary, in a lower grade than that held by an officer of the Regular Army in the temporary forces does not affect the status of the officer in the temporary forces, for the act of May 18, 1917, provides that officers of the Regular Army appointed to higher grades in such temporary forces shall not vacate their permanent

commissions nor be prejudiced in their relative or lineal standing in the Regular Army.

Ops. J. A. G. 210.142, Dec. 12, 1917.

PAY AND ALLOWANCES I, C, 5: Computing prior service of member of Nurse Corps (female).

A member of the Reserve Nurse Corps called to active duty on June 18, 1917, had theretofore had service in the Army Nurse Corps and Navy Nurse Corps, so that her total period of service amounted to about three years and four months.

Held, that she was entitled to have all prior service in both Army and Navy counted in computing her pay under the act of March 23, 1910 (sec. 1832, U. S. Comp. St. 1916) and was entitled to be paid as of the second period of three years' service.

Ops. J. A. G. 322.31, Dec. 13, 1917.

PAY AND ALLOWANCES II: Heat, light, and quarters for Army field clerks.

Army field clerks who have not had 12 years' service, so as to come within the provisions of the act of August 29, 1916 (39 Stat. 625), are not entitled to have quarters rented for them or to be paid commutation for heat and light on the same basis as a second lieutenant.

Ops. J. A. G. 245.8, Dec. 18, 1917.

PAY AND ALLOWANCES I, B, 6: Longevity pay—Prior service in National Guard.

An officer of the National Army or of the Reserve Corps can not count prior service in the National Guard in computing service for longevity pay. Such service may be so counted only by officers drafted as National Guard officers, and only so long as they continue in service under the draft.

Ops. J. A. G. 241.12, Dec. 17, 1917.

PAY AND ALLOWANCES I, C: Pay of enlisted men of the Philippine Scouts.

Enlisted men of the Philippine Scouts are not entitled to the increases of pay authorized by section 10 of the selective-draft act of May 18, 1917. Their rates of pay are fixed by the Secretary of War under authority of section 36, act of February 2, 1901 (31 Stat. 757).

Ops. J. A. G. 322.82, Dec. 13, 1917.

PAY AND ALLOWANCES I, B: Pay of flying cadet.

A flying cadet who has been commissioned and is awaiting orders for service over seas, but who is not under duty to make aerial flights while awaiting such orders, is not entitled to flying pay.

Ops. J. A. G. 241.1, Dec. 10, 1917.

PAY AND ALLOWANCES II, A, 2 a (3): Transportation of baggage.

During the present emergency an officer ordered to duty in the field is entitled to have his authorized allowance of baggage shipped from his last permanent station to any place to which the cost of transporting same does not exceed the cost of transporting it to the place to which he is ordered. But when he has once received such allowance he is not entitled to another such allowance, even though he is thereafter ordered to field duty in another place.

Ops. J. A. G. 524.21, Dec. 3, 1917.

PUBLIC MONEY I, M: Money received from sale of garbage.

Since the United States has arranged for the collection and disposal of garbage from military camps, it can no longer be regarded as abandoned property. Money received from its sale must, therefore, be deposited in the United States Treasury. The opinion of January 11, 1912 (C 23876), is no longer applicable.

Ops. J. A. G. 131.1, Dec. 3, 1917.

RETIREMENT II: Rank on retirement.

An enlisted man after 30 years' service is eligible for retirement under existing laws with the noncommissioned rank which he then holds, whether in the Regular Army or in the other forces of the Army of the United States.

Ops. J. A. G. 220.85, Dec. 10, 1917.

RETIREMENT I, B, 5: Retirement of drafted National Guard officer.

Under section 112 of the national defense act of June 3, 1916, officers of the National Guard drafted into the service of the United States are entitled to the benefits of the pension laws. By section 2 of the selective draft act of May 18, 1917, the laws and regulations governing the Regular Army, except as to promotions, apply to such officers so drafted in so far as such laws and regulations are applicable to persons whose permanent retention in the military service is not contemplated by existing law. It is not contemplated that officers drafted into the service are to be permanently retained therein. Therefore the laws governing retirement do not apply to them, but the pension laws do apply.

Ops. J. A. G. 210.85, Dec. 19, 1917.

RETIREMENT II, A: Service to be counted by enlisted man.

An enlisted man of the Regular Army who has been transferred to one of the other component forces of the Army of the United States may, if he has had 30 years' service, be retired while serving with the forces to which he has been transferred, and in computing the period of his service he is entitled to count all service in any branch of the armed forces of the United States.

Ops. J. A. G. 220.85, Dec. 4, 1917.

SELECTIVE-DRAFT ACT: Drafted minors.

Where a registrant is certified by the district board for military service as being within the draft age, he can not be discharged from the military status thus imposed upon him either upon his own application or upon application of his parent or guardian upon the ground that he is not in fact of draft age. In the absence of fraud the decision of the board so certifying is final.

Ops. J. A. G. 324.71, Dec. 27, 1917.

SELECTIVE DRAFT ACT: Official authorized to make affidavit to secure deferred classification of employee.

The rules and regulations prescribed by the President under date of June 30, 1917, permit the commander or officer having command, the collector or his deputy, a person having direct supervision of persons employed by the United States, or any official of the Govern-

ment of the United States having direct supervision and control of the department, commission, board, bureau, division, or branch of the Government in which the person seeking deferred classification is employed, to execute the affidavit supporting the claim for deferred classification. An assistant engineer in charge of a river and harbor district is an official of the Government of the United States authorized to make such affidavit.

Ops. J. A. G. 013.14, Dec. 24, 1917.

TAX IV: War-revenue tax on motor vehicles.

The war-revenue act of October 3, 1917, imposes a tax upon all automobiles, etc., sold by the manufacturer, producer, or importer, which is required to be paid by said manufacturer, producer, or importer. There is no authority of law under which motor vehicles purchased by the United States may be exempted from the tax in order that the purchase price may be correspondingly reduced to the Government.

Ops. J. A. G. 012.23, Dec. 21, 1917.

DECISIONS OF COMPTROLLER OF THE TREASURY.

PROMOTIONS TO VACANCIES IN REGULAR ARMY CAUSED BY APPOINTMENTS IN NATIONAL ARMY.

Paragraph 1260 of the Army Regulations provides:

"A person appointed to the Army, or receiving an appointment to a new office therein, is entitled to pay from the date of acceptance only. If the appointment creates vacancies to be filled by promotion, the promoted officers are entitled to pay of the new grade from the date of acceptance of the appointee. In all other cases of promotion the officer is entitled to pay from the date of the occurrence of the vacancy."

The appointment of an officer of the Regular Army to a command in an organization composed of members taken from the National Guard would be to a new office within the meaning of said regulation. It therefore follows that the date when the appointment is accepted, or, in other words, the "date of acceptance of the appointee," is the date from which officers of the Regular Army temporarily promoted under section 114 of the national-defense act as a consequence of said appointment will be entitled to pay of the grade to which they are promoted.

Taking the oath of office after an appointment, or after confirmation, when that is necessary, constitutes an acceptance of the appointment. An acceptance may also be implied by entering upon the discharge of the duties of the office after appointment, or after confirmation, when that is necessary, before taking the oath. (See 4 Comp. Dec. 496.)

Comp. of Treas. Nov. 26, 1917.

DECISIONS OF THE DIRECTOR OF THE BUREAU OF WAR-RISK INSURANCE.

PERSONS ENTITLED TO WAR-RISK INSURANCE, AND OTHER BENEFITS OF THE ACT OF OCTOBER 6, 1917.

(1) *Field clerks, Quartermaster Corps.*—Field clerks, Quartermaster Corps, are within the terms of the act as enlisted men.

(2) *Army field clerks.*—Army field clerks have the same military status as field clerks, Quartermaster Corps, and are within the terms of the act as enlisted men.

(3) *Members of training camps.*—Members of training camps authorized by law are within the terms of the act.

(4) *Students in aviation camps.*—Students in aviation camps who are enlisted men are within the terms of the act.

(5) *Medical officers, Public Health Service.*—Officers of the Public Health Service when detailed for duty with the Army or Navy are within the terms of the act as officers in the active service of the United States. (See T. D. 8, W. R. (8), as to "contract surgeons.")

(6) *Male nurses, enlisted.*—Male nurses who are enlisted men of the Medical Department are within the terms of the act. (But see T. D. 8, W. R. (9), as to civilians employed as "contract nurses.")

(7) *Retired officers or men ordered to active duty.*—Officers and men on the retired list who are ordered to active duty by the War Department or Navy Department are in active service and are within the terms of the act.

(8) *Personnel of Lighthouse Service.*—The personnel of the Lighthouse Service, transferred to the service and jurisdiction of the War and Navy Departments by Executive order pursuant to the act of August 29, 1916, are within the terms of the act of October 6, 1917.

PERSONS NOT ENTITLED TO THE BENEFITS OF THE ACT OF OCTOBER 6, 1917.

(1) *Cadets at West Point and midshipmen at Annapolis.*—Cadets at West Point and midshipmen at Annapolis who are not assigned to active service are not within the terms of the act.

(2) *Cadets and cadet engineers, Coast Guard.*—Cadets at the Coast Guard Academy and cadet engineers in the Coast Guard who are not assigned to active service are not within the terms of the act.

(3) *Russian Railway Service Corps.*—Men in the Russian Railway Service Corps are not within the terms of the act.

(4) *Draftsmen in Engineer Corps.*—Draftsmen in the Engineer Corps are civilian employees in the Military Establishment obtained by the department through the civil service and are not within the terms of the act.

(5) *Field clerks, Engineer Corps.*—The so-called field clerks in the Engineer Corps are civilian employees who have no military status. They are not within the terms of the act.

(6) *Civilian field clerks, Signal Corps.*—Civilian field clerks, Signal Corps, are civilian employees in the Military Establishment and are not within the terms of the act.

(7) *Postal agents serving in France.*—Postal agents sent to France by the Post Office Department to handle field mail for the troops are civilian employees and are not within the terms of the act.

(8) *Contract surgeons.*—Contract surgeons are civilians under employment by the United States by contract for their personal services as medical attendants to the troops and are not within the terms of the act. (See T. D. 7, W. R. (5), as to medical officers, Public Health Service.)

(9) *Contract nurses.*—Civilians employed as "contract nurses" in the Army or Navy are not within the terms of the act. (But see T. D. 7, W. R. (6), as to enlisted male nurses.)

33 Treas. Dec. 65–67, T. D. 7, W. R. T. D. 8, W. R. Dec. 12, 1917.

NOTES ON MILITARY JUSTICE.

CONDUCT DISGRACEFUL TO THE SERVICE.

An officer of the Regular Army was recently brought to trial for being drunk at a military hop, the charge being laid under the ninety-sixth article of war. He pleaded guilty, was so found by the court, and sentenced to be reprimanded and reduced in rank 25 files. In administering the reprimand the reviewing authority remarked that the accused had been tried three times for drunkenness during a preceding period of less than eight months. The following comment with reference to the charge preferred in this case and to the punishment imposed appeared in the Acting Judge Advocate General's review of the case:

"This record indicates that, prior to this trial, the accused had been tried three times for drunkenness within the preceding eight months. This fact must have been known to his superior officers, and particularly to those who are responsible for the charges in this case. Under these circumstances, to charge the accused with violation of the ninety-sixth rather than with violation of the ninety-fifth article of war comes very near being an official condonation of his offense prior to trial, and an invitation to the court to award a sentence less than dismissal from the service * * *. The sentence awarded by the court in this case does violence to the sense of military justice which should prevail in the service. The accused was drunk in uniform at a hop, * * * which was largely attended by members of the service as well as by some civilians. He should have been charged with conduct unbecoming an officer and a gentleman, upon a conviction of which dismissal would have been mandatory."

Dismissal of the accused from the service under the one hundred and eighteenth article of war was recommended. During the trial of this case a captain, called as a witness for the prosecution, testified, in part, as follows:

"Q. Well, how could his conduct have been disgraceful to himself while he was in uniform and not be disgraceful to the service?

"A. That's a question, I think, sir, that depends on the viewpoint of each individual. I do not feel that at a hop of that nature that a man who is drunk to the extent that (the accused) was degrades the service in the minds of anyone who is there. I base this assumption on the fact that other officers have, to my knowledge, been drunk at transport hops, and I have never heard anyone say that they felt the service has been discredited in any way, and no action had been taken against them. Had many civilians been present and, to my

knowledge, have seen (the accused), then the service might have been discredited; but without a knowledge of the feelings of those civilians, I am unable to state positively that in their minds discredit was brought. That question was brought up at the time, to my knowledge, of the drawing of these charges and because of the fact that the officers concerned in the preparation of the charges did not know the minds of such civilians as were present, a statement to the effect that it was a disgrace to the service was purposely left out."

In commenting upon this testimony, the Acting Judge Advocate General used the following language:

"The view expressed by (the witness) is highly discreditable to the service to which he belongs. It implies, to some extent at least, that the service can not be discredited in its own eyes, and that the conduct of an officer in uniform, unless witnessed and considered discreditable by civilians, should not generally be regarded as discrediting the service. Views such as this should not be allowed to go unchallenged. The service should hold its own standards in such high esteem that outside opinions should not be necessary in determining what conduct shall be regarded as a violation of or departure from such standards."

PROCEDURE ON REVISION: Constitution of court.

In a recent case it was necessary for the reviewing authority to return the record of trial of a soldier convicted of larceny to the court with directions to reconvene and correct certain errors therein, which was done. Upon examination of the record in the office of the Judge Advocate General it was found that the proceedings in revision were invalid for the reason that a member of the court absent at the trial participated therein. The record was returned to the reviewing authority, who then issued an order setting the sentence aside as being invalid. No reason is apparent for not again reconvening the court in order that it might correct the record in proper proceedings in revision. By this action of the reviewing authority the trial was rendered ineffectual, and a soldier convicted of a crime involving moral turpitude unnecessarily escaped merited punishment.

PROCEDURE ON REVISION: Taking of new evidence.

A soldier was recently found not guilty by the court of sleeping on post in time of war. The reviewing authority returned the record of trial to the court with directions to reconvene and reconsider its findings, expessing the view that the evidence of record clearly established the guilt of the accused. The court thereupon reconvened, called another witness, and proceeded to take additional testimony in the case, at the conclusion of which it found the accused guilty and imposed a sentence. The reviewing authority very properly disapproved the proceedings, findings, and sentence, with the appropriate comment that "this introduction of new evidence after the case was closed was most improper and illegal."

REVIEWING AUTHORITY: Power of disapproval.

In the case of a soldier tried and convicted on October 22, 1917, of desertion in time of war, the reviewing authority returned the record of trial to the court with the comment that "the record * * * wholly fails to show an intent on the part of" the accused "to desert * * * and no facts appear therein from which such intent can be

presumed. The court will therefore reconvene for further consideration of the case." In compliance with such instructions, the court reconvened November 16, 1917, revoked its former sentence, and imposed a new one, but did not alter its findings.

The forty-seventh article of war expressly empowers the reviewing authority to "approve or disapprove a finding, and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when" in his opinion, "the evidence of record requires a finding of only the lesser degree of guilt, and * * * to approve or disapprove the whole or any part of the sentence."

The reviewing authority had ample power, and it was his duty, to act upon the findings and sentence in accordance with his view of the evidence. By his action in this case he not only permitted a finding of guilty of desertion in time of war not sustained by the evidence to stand, but he prolonged the confinement of the accused practically a month.

REVIEWING AUTHORITY: Procedure where sentence is improper in form.

In the case of a soldier recently convicted of disrespect toward a commissioned officer, willful destruction of private property, and assault with intent to do bodily harm, the record of trial was returned by the Judge Advocate General to the reviewing authority for further action, for the reason that proceedings in revision for the correction of a sentence improper in form but legally sufficient were invalid. Instead of reconvening the court, to which no legal or other objection is apparent, or giving vitality to the original sentence by proper action thereon, the reviewing authority issued an order declaring the sentence null and void and ordering the accused released from confinement and restored to active duty with his company. By this action a soldier properly convicted of three very serious offenses committed in time of war escaped practically all punishment therefor.

SENTENCE FOR BUCCAL COITUS: Confinement in penitentiary.

The reviewing officer in two recent cases cited a Vermont statute as authority for confinement in the penitentiary of two soldiers convicted of buccal coitus. The forty-second Article of War provides that "except for desertion in time of war, repeated desertion in time of peace, and mutiny no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature by some statutes of the United States or at the common law as the same exists in the District of Columbia, * * *." This office has recently held that buccal coitus under the clear trend of modern authority is included within the crime of sodomy at the common law as the same exists in the District of Columbia, and that this is sufficient to authorize confinement in a penitentiary in cases of this character.

SENTENCE: Dishonorable discharge.

A soldier who had been in the service less than a month, in testifying in his own behalf upon trial for larceny, disclosed his desire to escape military service by the following statement:

"This stuff was taken more through soreness and agony than anything else. It wasn't the value of the stuff, because it could be bought a whole lot cheaper, I expect, than it was got."

The court practically gratified his desire by imposing a sentence of dishonorable discharge and six months' confinement. Encouragement to commit offenses for purpose of escaping military service imparted by lenient sentences, especially at this time, is bound to result detrimentally to the service. The duty of courts-martial to impose sentences possessing sufficient deterrent effect to prevent the resort by a certain class of men to the commission of crime as a means of getting out of the Army is one which can not be ignored.

SENTENCE: Punishment for desertion committed in time of peace.

In the case of a soldier tried after the declaration of war for desertion on January 12, 1917, the president of the court, in advising the accused of the effects of his plea of guilty of absence without leave, properly stated the maximum punishment imposable by the court thereunder to be dishonorable discharge, total forfeitures, and confinement at hard labor for six months, which is the limit prescribed by the Executive order of September 5, 1914, in effect at the time the accused left his organization. The reviewing authority, in a lengthy order acting upon the case, quoted part of a department bulletin relative to the abrogation by the declaration of war of the limits-of-punishment order promulgated by the President, and criticized the court and the judge advocate in the following language:

"This bulletin was published in order that notice should be brought to all officers and in order that such mistakes as was made in this case should not occur. It is apparent that the judge advocate, president, and members of this court were negligent in not reading bulletins published for their instruction and guidance."

This view of the reviewing authority was erroneous. The limits of punishment prescribed by the President should be observed by courts and reviewing officers with respect to all crimes committed prior to the declaration of war, as they are peace-time and not war-time offenses, even though the trials occur in time of war. The time of commission of the offense and not the time of trial governs the punishment therefor.

DECISIONS OF COURTS.

JURISDICTION OF COURTS-MARTIAL OVER CIVILIANS ON ARMY TRANSPORT.

The opinion of the United States District Court, Southern District of New York, in the case of Charles E. Gerlach is as follows:

AUGUSTUS N. HAND, *District Judge:*

Charles E. Gerlach, an employee of the United States Shipping Board, went to Europe as mate on the steamship *McClellan*, a vessel apparently in use as a military transport, though this fact was not definitely proved. He was there discharged and sent back on the *El Occidente*, an Army transport, to New York. He volunteered to stand watch and for several days did this, but finally refused to continue. For this disobedience to the military order of

an Army officer he was tried by court-martial and sentenced to five years' imprisonment.

The second article of war (R. S. 1342, as amended by the act of Aug. 29, 1916, 39. Stat., 573) reads as follows:

"The following persons are subject to the Articles of War: (*e*) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to the Articles of War."

I think Gerlach was a person accompanying the Army of the United States, and also *voluntarily* serving with the armies of the United States at the time he disobeyed the order. I further hold that he was "in the field" and without the territorial jurisdiction of the United States within the meaning of the article. The words "in the field" do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted. In this case he was on an Army transport, and peril from submarines existed when he refused to stand watch. The captain in charge of the vessel had, in my opinion, the right to call upon all persons on board to protect the transport in any way that seemed best, in view of the danger. The section of the Articles of War subjecting persons accompanying armies to military authority not only enables military officers to preserve order on the part of such persons, but also, in the cases that it covers, to call on them for assistance and direct their action while they are properly in the field of military operations. The court-martial, therefore, had exclusive jurisdiction by the terms of the Articles of War over this man, who not only accompanied the Army but volunteered to serve, unless the act of Congress which adopted the Articles of War is unconstitutional.

Section 8 of Article I of the Constitution is the source of authority for the Articles of War. Congress is thereby given power to raise and support armies, to make rules for the government of land and naval forces, and to make all laws which shall be necessary for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States. This is in aid of the general war power, and ought to be given a broad scope in order to give the fullest protection to the Nation. That an officer should be able to call upon a person accompanying the military forces, who had volunteered and, indeed, asked to stand watch, as Gerlach had, to protect a transport and its occupants in time of danger by standing watch, is certainly within the fair object of the Articles of War, and is a reasonable power for carrying into execution the government of military forces. The act is therefore, in my opinion, constitutional.

The writ was properly dismissed and the prisoner remanded to the custody of the military authorities.

December 10, 1917.

DIGEST OF CERTAIN OTHER OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY PUBLISHED IN VOL. 1, OPS. J. A. G. 1917.

NATIONAL DEFENSE ACT: National Guard; State administrative staff officers.

The Judge Advocate General in a memorandum for the Chief of the Militia Bureau, dated February 1, 1917, rendered an opinoin holding that the national defense act (39 Stat. 166) requires that the organization of the National Guard as a whole, and not the National Guard in each State, Territory, and the District of Columbia, shall be the same as that prescribed for the Regular Army; and that consequently such State administrative staff officers as are additional to those authorized by the national defense act, in so far as their relations to the general government are concerned, are in the same status as adjutants general of the various States, that is, they are designed for the administrative functions of the State and do not constitute a part of the National Guard as authorized by the national defense act. This opinion is adhered to.

Ops. J. A. G. 58–210, Apr. 2, 1917.

ENLISTED RESERVE CORPS: Railway engineer regiments, organization of.

Section 55 of the national defense act (39 Stat. 166, 196), which provides for the ordering to active service of the Enlisted Reserve Corps, contains no authority for the formation of organizations and the creation of officers but contemplates the use of the members thereof with existing organizations of the Regular Army. The authority contained in sections 1 and 8 of the selective draft act (40 Stat. 76, 81) to appoint general officers and line and staff officers is limited to officers necessary for the forces thereby created, and is not applicable to brigades composed of regiments of such reserves. The President may, however, authorize the reenlistment of the men already enlisted for the Engineer Reserve regiments under the provision contained in section 2 of said selective draft act, for the organization of special and technical troops, and he may then officer them, organize them into brigades, and appoint brigade commanders, under the authority of section 8 of said act.

Ops. J. A. G. 6–302.1, May 26, 1917.

ENLISTMENT: Reenlistment during the emergency.

A sergeant, first class, Quartermaster Corps, may not be permitted to reenlist for general recruiting service upon what would normally be the termination of his term of active service under his present enlistment, June 29, 1917, because by section 7 of the selective draft act of May 18, 1917 (40 Stat. 76, 81), all enlistments continue in force during the emergency unless sooner discharged. He may, however, be transferred to the general recruiting service if such action is deemed advisable.

Ops. J. A. G. 28–240, May 26, 1917.

ENLISTMENT: Qualifications for enlistment in National Guard.

The qualifications and conditions for voluntary enlistment prescribed in section 7 of the selective draft act (40 Stat. 76, 81) are not applicable to enlistment in the National Guard when it is not in the Federal service.

Ops. J. A. G. 58–232, May 29, 1917.

ARMY: ENLISTED RESERVE CORPS: Railway engineer organizations.

The Enlisted Reserve Corps is an independent corps which may be assigned to duty with the Regular Army or other component part of the Army of the United States, but which can not be integrated therewith. The provisions of clause 3, section 1, selective draft act (40 Stat. 76), for the appointment of officers is not applicable thereto.

Ops. J. A. G. 302.1, June 4, 1917.

ENLISTED RESERVE CORPS: Railway engineer regiments, organization of.

Since officers may not be appointed for organization of members of the Enlisted Reserve Corps, but must, under section 55 of the national defense act (39 Stat. 166, 195), be supplied by the detail of Regular Army officers or the assignment of members of the Officers' Reserve Corps it is necessary to reorganize the regiments referred to by discharging the enlisted men from the Enlisted Reserve Corps and reenlisting them as technical troops under the authority of the proviso of section 2 of the act of May 18, 1917 (40 Stat. 76, 77). For this purpose an Executive order directing the organization must be issued in order to bring into being the organization into which the men now included in the provisional organizations are to be embodied.

Ops. J. A. G. 6–302.1, June 5, 1917.

ENLISTED RESERVE CORPS: Railway engineer regiments, appointment of general officers.

General officers can not be appointed for brigades and divisions consisting of regiments composed of enlisted reservists organized under section 55 of the national defense act (39 Stat. 166, 195). If, however, such organizations of enlisted reservists are transformed by reenlistment into organizations of special and technical troops created under the authority of the proviso of section 2 of the selective draft act, such general officers may be appointed under authority of section 8 of that act.

Ops. J. A. G. 6–302.1, June 7, 1917.

FIELD CLERKS, QUARTERMASTER CORPS: Temporary vacancy.

In the case of a field clerk, Quartermaster Corps, who is a member of the Officers' Reserve Corps and is ordered as such to active duty, the resulting vacancy in the field clerkship should be filled by a temporary appointment.

Ops. J. A. G. 6–135, June 7, 1917.

CONTRACTS: Munitions of war; Right of Secretary of War to order a manufacturer to furnish supplies to be transferred to an allied government.

Where a manufacturing company doing business in the United States and under contract to manufacture necessary munitions of war

for the British Government refuses to renew such contract except upon terms which are arbitrary and unfair, the Secretary of War, by authority of section 120 of the national defense act (39 Stat. 166, 213), may order such contractor to furnish such munitions to the Government of the United States, at a price to be fixed by the Secretary of War if the contractor refuses to furnish the same at a reasonable price, and such munitions when delivered to this Government may be transferred to the British Government under an arrangement for reimbursement by the British Government for the cost thereof.

Ops. J. A. G. 99–301, June 9, 1917.

ARMY: Issuance of new commissions to officers of former Quartermaster's, Subsistence, and Pay Departments.

It is not necessary that the President should appoint or issue new commissions to the officers of the Quartermaster's, Subsistence, and Pay Departments of the Army, which by section 3 of the act of August 24, 1912 (37 Stat. 569, 591), were consolidated into the Quartermaster Corps of the Army. The statute expressly provides that the officers of said departments as consolidated "shall hereafter be known as officers of said corps and by the titles of the rank held by them therein." If any new commissions to the officers so transferred are issued under the statute, no nomination or confirmation is necessary.

Ops. J. A. G. 6–224, June 13, 1917.

ARMY: Special and technical troops; Recruit training units.

The special and technical troops authorized by section 2 of the selective draft act are in addition to the number of drafted forces authorized elsewhere in said act. (40 Stat. 76, 77.)

The recruit training units authorized by section 1 of said act are to be raised by draft exclusively, even though designed to maintain, among other forces, organizations of the Regular Army and drafted National Guard. Nevertheless, men who have voluntarily enlisted may, by administrative action, be trained in those units, although they can not legally be members thereof.

Ops. J. A. G. 6–200, June 15, 1917.

ARMY CHAPLAINS: Qualifications for appointment.

The amendment of section 15 of the national defense act (39 Stat. 166, 176) contained in the Army appropriation act of May 12, 1917 (40 Stat. 40, 72), as to the appointment of chaplains in the Army, became effective from the date of its approval, and leaves the qualifications for appointment to that office as prescribed in the general law (31 Stat. 748, 750). Thus a person over 40 years of age and under 41, who was nominated but not appointed prior to May 12, 1917, is not eligible for appointment as chaplain.

Ops. J. A. G. 64–233.3, June 16, 1917.

OFFICE: Philippine Scouts; Eligibility of officers of, for appointment as second lieutenants, Regular Army.

Philippine Scout officers to be eligible for appointment as provisional second lieutenants of the Regular Army must be unmarried. Clause 2 of the second paragraph of section 24 of the national-defense act (39 Stat. 166, 182) gives to officers of the Philippine Scouts the same privileges and subjects them to the same requirements as

enlisted men of the Army; and the latter are specifically required by the statute to be unmarried in order to be eligible for appointment as provisional second lieutenants. The amendment of said section 24, contained in the act of May 12, 1917 (40 Stat. 40, 44), does not affect this question.

Ops. J. A. G. 64–212, June 16, 1917.

ARMY: Corps of interpreters, authority for organization of.

A proposed corps of interpreters, to consist of a commissioned personnel numbering 100 and an enlisted personnel numbering 72, may not be organized as "special and technical troops" under section 2 of the selective draft act (40 Stat. 76, 77). They may, however, be included in headquarters organizations under authority of section 3 of the national defense act (39 Stat. 166).

Ops. J. A. G. 6–200, June 20, 1917.

PAY AND ALLOWANCES: Right to extra-duty pay; Distinction between extra duty and special duty.

Since the right to extra-duty pay is given by statute and can therefore be taken away only by legislation, instructions of the Secretary of War that no extra-duty pay will be allowed after the approval of any act giving increased pay can not operate to deprive enlisted men who are actually employed in extra duty in pursuance of competent orders of the right to receive extra pay therefor.

Ops. J. A. G. 72–230, June 20, 1917.

SELECTIVE-DRAFT ACT: Applicable to Porto Rico and Poto Ricans.

The selective draft act (40 Stat. 76) applies to Porto Rico. All citizens and natives of Porto Rico who had not declared their intention not to become citizens of the United States on or before May 18, 1917, are subject to registration and draft.

Ops. J. A. G. 6–250, June 22, 1917.

ARMY: Personal aids for major generals and brigadier generals.

The Secretary of War can not authorize a major general to have, during the period of the emergency, one or more majors as personal aids, not to exceed three, in lieu of a like number of captains or lieutenants; nor can he authorize a brigadier general to have one or more captains as personal aids. Sections 11 and 14 of the selective draft act (40 Stat. 76, 82, 83), do not suspend the restrictions contained in section 1098, Revised Statutes.

Ops. J. A. G. 6–200, June 26, 1917.

SELECTIVE DRAFT ACT: Citizenship; Expatriation after enactment of draft act.

United States citizenship is acquired by the mere fact of birth within the United States of a person owing allegiance, temporary or permanent, to the United States. Aliens who have acquired American citizenship, in the event of their return to the country of origin and reacquisition of their original citizenship, either by choice or by recovery, will simply lose American citizenship by one of these two facts. Any American citizen, whether native born or naturalized, who acquired foreign citizenship prior to the passage of the selective draft act (40 Stat. 76) would not fall within the terms of the act;

but expatriation after the passage of the act would not exempt a person from his obligation to render involuntary service thereunder.
Ops. J. A. G. 13–210, June 26, 1917.

ARMY: Increase in enlisted personnel of Regular Army.

Under authority of section 1 of the selective draft act (40 Stat. 76), the President can now increase the enlisted personnel of the line of the Army to the extent necessary to organize all line organizations to meet the essential requirements of the existing emergency.
Ops. J. A. G. 6–200, June 28, 1917.

OFFICE: Age requirements of enlisted men, candidates for appointment as second lieutenants.

To be eligible for appointment to vacancies in the grade of second lieutenant created or caused by increases due to the national defense act (39 Stat. 166), enlisted men of the Army must be between the ages of 21 and 34 years, while for appointment to other vacancies there is no statutory minimum age limit for such candidates.
Ops. J. A. G. 64–212, June 28, 1917.

ARMY: Burial expenses of cadets.

There is no appropriation available for the payment of burial expenses of cadets of the United States Military Academy.
Ops. J. A. G. 6–131, June 30, 1917.

PANAMA CANAL ZONE: Transportation for troops on west side of Canal Zone.

In order to furnish necessary transportation to troops isolated on the west side of the Panama Canal, it is permissible for the Quartermaster Department either to lease from the Panama Railroad the necessary tracks and equipment and operate it as an Army plant, or to charter the west side system of the Panama Railroad as a going concern.
Ops. J. A. G. 92–523.2, June 30, 1917.

ARMY: Enlistment; Voluntary enlistment in Regular Army and National Guard after draft is resorted to.

Under section 2 of the selective draft act (40 Stat. 76, 77) two methods are provided for raising and maintaining the Regular Army and National Guard, viz, voluntary enlistment and draft. They may be used concurrently. Men voluntarily enlisted for the Regular Army or National Guard may be attached to units raised by draft under section 1 of said act.
Ops. J. A. G. 34–050, July 2, 1917.

OFFICE: Selective Draft Act; Time of appointing officers for service in National Army.

The selective draft act (40 Stat. 76) imposes no restrictions as to the time when appointments of officers of the National Army are to be made. Officers for units to be organized may be appointed before completion of the organization thereof.
Ops. J. A. G. 6–200, July 3, 1917.

OFFICERS' RESERVE CORPS: Public and private mounts.

In view of the temporary status with respect to active duty of reserve officers, the Secretary of War may prescribe that they will be furnished with the necessary public mounts save in the exceptional

cases where the interests of the Government require them to provide themselves with mounts under the terms of the act of May 11, 1908. (35 Stat. 106, 108.)

Ops. J. A. G. 94–011, July 3, 1917.

CONTRACTS: Unauthorized contracts by National Guard officers in Federal service for hire and purchase of horses and mules.

Contracts made by National Guard officers without authority from the War Department for the hire and purchase of horses and mules for use in Federal service are not binding upon the United States. The War Department may, however, pay a reasonable compensation for the hire of such draft animals used by the National Guard in the Federal service as were actually necessary under the circumstances.

Ops. J. A. G. 58–301, July 5, 1917.

MESS SERGEANTS: Detail of enlisted men.

Enlisted men of any grade may be detailed as mess sergeants, but such details from the grade of sergeant, first class, Medical Department, may be made only by special authority of the Surgeon General in each individual case.

Ops. J. A. G. 72–200, July 7, 1917.

MILITIA: Pay and allowances; Retired enlisted man commissioned in federalized National Guard.

A retired enlisted man of the Regular Army is eligible as an officer of a National Guard regiment to be mustered into the Federal service without being first discharged as a retired enlisted man. While in receipt of pay as such National Guard officer his pay as a retired enlisted man will be discontinued. Upon discharge from Federal service as a National Guard officer his right to retired pay will be revived.

Ops. J. A. G. 88–931, July 7, 1917.

OFFICERS' RESERVE CORPS: Eligibility of military storekeeper and second lieutenants, Quartermaster Corps, for higher grades in Reserve Corps.

The military storekeeper and second lieutenants, Quartermaster Corps, can not be given higher rank in the Officers' Reserve Corps, Quartermaster section, but they are eligible for temporary commissions in the regular forces.

Ops. J. A. G. 82–120, July 7, 1917.

APPROPRIATIONS: Vocational training at Disciplinary Barracks.

Appropriations for the initiation and maintenance of vocational training in the Army are applicable to the establishment and maintenance of such training in the disciplinary organizations at the Disciplinary Barracks at Fort Leavenworth, Kans.

Ops. J. A. G. 56–129.4, July 10, 1917.

WAR: Censorship of cable dispatches.

The President may, in the absence of legislation by Congress on the subject, prohibit the operation of any cable connection with a foreign country if in his judgment such action is necessary to the safety of our troops or the proper concealment of military plans and operations; or he may permit their continued operation under conditions that will prevent such operation from being hurtful to the interests of the Government. To this end the Secretary of War, acting for the President, may establish a censorship over cable dispatches arriving in this country or leaving this country as a condition to

permitting the continued operation of the cable connections with foreign countries.

Ops. J. A. G. 99–270, July 10, 1917.

ARMY NURSES: Commutation of rations of nurses on duty in France.

Where nurses are on duty in France at hospitals in which the regular hospital mess system is not used and the nurses do not have the benefit of the economies of such system, they may be regarded as on detached duty within the meaning of Army Regulations 1223 and be given commutation of rations at the rate of $1 per day. But if subsisted in a regular hospital mess operated under the officer in command of the hospital, the only rate of commutation allowable is that fixed by the Army appropriation act (40 Stat. 40, 50).

Ops. J. A. G. 6–227.2, July 13, 1917.

CIVILIAN EMPLOYEES: Pay; Right of employees of Army Medical Supply Depot to extra pay for overtime work.

Permanent employees of the Army Medical Supply Depot, who are paid on an annual basis, are not entitled to extra pay for overtime work.

Ops. J. A. G. 16–402, July 13, 1917.

CONFINEMENT: Date when sentence begins to run.

A sentence of confinement begins to run on the date of the order publishing the case, although the reviewing authority, in excess of his authority, sought to suspend the sentence.

Ops. J. A. G. 30–823.1, July 13, 1917.

CONTRACTS: Settlement of claim for unliquidated damages; disposition of proceeds of sales of old materials.

Where a contract makes no provision for determining disputes arising thereunder, a claim for breach thereof is such an unliquidated claim as can not be compromised or settled by executive officers of the Government. Nor can the proceeds of a sale of old materials be used to offset a claim growing out of a separate contract, for such proceeds are required to be deposited in the Treasury as "Miscellaneous receipts."

Ops. J. A. G. 76–700, July 17, 1917.

PUBLIC PROPERTY: Sale of private mount by officer to Government.

Army regulation 1095 authorizes the purchase by the Government from a mounted officer of the Army of a mount theretofore purchased by the officer from the Government, even though such officer is not relieved from mounted duty or ordered to duty beyond seas or required to make a change of station involving an expense exceeding $100 for the transportation of such mount.

Ops. J. A. G. 94–011, July 18, 1917.

PUBLIC HEALTH SERVICE: Right to purchase uniform clothing and quartermaster supplies.

Army regulation 1174 (C. A. R. No. 58, June 6, 1917) does not authorize the sale of uniform clothing and other quartermaster supplies to commissioned officers and employees of the Public Health Service, which was made a part of the military forces of the United States by the Executive order of April 3, 1917.

Ops. J. A. G. 14–122.5, July 19, 1917.

CONTRACTS: Right to modify or cancel Government contract because of hardship on contractor.

The fact that the cost of raw materials has for unforeseen reasons so advanced as to make the contract price for ether agreed to be furnished the Government so inadequate as to compel the contractor to operate at a loss furnishes no legal justification for a modification or cancellation of the contract.

Ops. J. A. G. 76–610, July 23, 1917.

OATHS: Right of assistant to department adjutant to administer oaths for military purposes.

An assistant to a department adjutant is not an "adjutant of any command" within the terms of the one hundred and fourteenth article of war and has no authority to administer an oath for purposes of military administration.

Ops. J. A. G. 64–219, July 24, 1917.

RANK: Relative rank of officers in Regular Army, National Army, National Guard, and Officers' Reserve Corps.
OFFICE: Eligibility of officers in Regular Army and National Guard for commissions in Officers' Reserve Corps.

Officers of the Officers' Reserve Corps, when ordered to active duty, take rank as "officers of forces drafted or called into service of the United States" under the one hundred and nineteenth article of war. Officers of the Regular Army commissioned in a higher grade of the National Army are entitled to rank as if their commissions in the National Army were commissions in the Regular Army.

An officer of the Regular Army or of the National Guard on the active list may not be appointed to the Officers' Reserve Corps.

Ops. J. A. G. 82–200, July 25, 1917.

PAY AND ALLOWANCES: Right to pay of soldier injured while confined in hospital on account of disease resulting from his own misconduct.

Where a soldier, absent from duty in a hospital on account of disease resulting from his own misconduct, receives an injury in the course of medical treatment properly and skillfully administered and is absent from duty for a further period on account of such injury, he is entitled to receive no pay for such further period. If the injury is due to improper or unskillful treatment, he is entitled to pay for the period of absence occasioned thereby.

Ops. J. A. G. 72–210, July 26, 1917.

RAILROADS: Compensation of land-grant railroad for transporting troops.

A railroad receiving a land grant under the act of July 28, 1866 (14 Stat. 338), is required to transport property and troops of the United States at the cost charge and expense of the company or corporation owning or operating it and is not entitled to compensation therefor under the Army appropriation act of May 12, 1917. (40 Stat. 40, 54.)

Ops. J. A. G. 94–061, July 27, 1917.

MILITIA: Effect of draft of National Guard organization into Federal service on prior offenses and existing courts-martial.

Members of the National Guard in the Federal service on August 5, 1917, and drafted as of that date continue their status as persons in

the military service, and jurisdiction over offenses committed by them prior to August 5, 1917, continues. General courts-martial existing in the National Guard on August 5, 1917, ceased to exist at the time of the draft, and have no authority thereafter to function.

Ops. J. A. G. 28–711, July 30, 1917.

ARMY BANDS: Rendering gratuitous service; Competition with civilian bands.

The giving of a public concert by a military band by direction of its commanding officer, for which the members of the organization receive no compensation either as individuals or as an organization, does not constitute an interference with the customary and regular engagement of local civilians within the inhibition of section 35 of the national defense act (39 Stat. 166, 188).

Ops. J. A. G. 8–421, Aug. 1, 1917.

CONTRACTS: Designation of newspapers for advertising.

The requirements of section 3828, Revised Statutes, are complied with by the Secretary of War's granting general authority in writing to a subordinate officer to insert advertisements in newspapers to be selected by the latter in a given locality, provided that the subordinate officer gives specific orders in writing to each of such newspapers for the particular advertisements. The granting of such authority will constitute a waiver of the requirements of Army Regulations 499 so far as the same are inconsistent herewith.

Ops. J. A. G. 76–110, Aug. 1, 1917.

APPROPRIATIONS: Rental of building in Washington, D. C., for use of Army Medical School.

The item for contingent expenses under the War Department appearing in the urgent deficiency act of June 15, 1917 (40 Stat. 182), is available only for expenses of the War Department as an executive department and not for expenses of the Military Establishment. Consequently, it can not be used for the rental of a building for a service school such as the Army Medical School. The use of appropriations pertaining to the Quartermaster Corps for such purpose, if the building is located in Washington, is forbidden by the act of June 22, 1874 (18 Stat. 133, 144).

Ops. J. A. G. 5–111, Aug. 3, 1917.

OFFICE: Whether election of National Guard officer to advanced grade is an appointment or a promotion.

An officer of the Regular Army, where promotions are required by statute to be made according to seniority, subject to examination, is entitled to the pay of the advanced grade from the date of the vacancy to which he is promoted. Where promotions are not made according to seniority, each promotion is regarded as a new appointment; and the officer thus promoted is entitled to the pay of the advanced grade from the date of acceptance of his commission therein. An officer of the National Guard elected to an advanced grade must be regarded as appointed rather than as promoted by seniority.

Ops. J. A. G. 58–700, Aug. 4, 1917.

CONTRACTS: Advance payment; Payment for goods purchased f. o. b. shipping point after delivery there but before their receipt at destination.

Where goods are bought f. o. b. shipping point, payment for them after delivery f. o. b. shipping point and before their receipt at point of destination is not an advance payment within the inhibition of Revised Statutes 3648.

Ops. J. A. G. 76–700, Aug. 6, 1917.

ARMY: Drafted forces not part of the Regular Army.

The forces brought into the Army of the United States by draft are not part of the Regular Army. The Regular Army is that force raised and supported by Congress, maintained in peace and war, and having a continuous and permanent existence. It is, of course, a component part of the Army of the United States, but is separate and distinct from the drafted forces. Hence, legislation which prohibits members of the Regular Army from voting does not affect members of other component forces of the Army of the United States.

Ops. J. A. G. 86–210, Aug. 7, 1917.

APPROPRIATIONS: Rental of building in Manila to house soldiers on leave.

The appropriation for "Barracks and quarters" (39 Stat. 619, 638) is limited to the provision of shelter and protection for officers, and enlisted men of the Army at military posts and stations, and can not properly be applied to the lease of a building to supply men with accommodations while on leave and away from their stations. Arrangements for such temporary accommodations might be made by the post exchange.

Ops. J. A. G. 40–100, Aug. 8, 1917.

PAY AND ALLOWANCES: Forfeiture of right to reservist's pay by failure to report address, etc.

Answering to the call and reporting to active service by a member of the Regular Army Reserve does not remove any bar that may have previously existed against the receipt of reservist's pay by him because of his failure to report his address and to present himself to the postmaster or to an Army or Navy officer with the request that such postmaster or officer sign a statement that he is apparently in good physical condition.

Ops. J. A. G. 6–300, Aug. 8, 1917.

ARMY: Grade of mess sergeant for Engineer band.

By the national defense act (39 Stat. 166) the grade of mess sergeant is created for companies of the Engineer Corps but none is provided for the Engineer band. Accordingly, pursuant to rulings of the Comptroller (22 Comp. Dec. 718; 81 MS. Comp. Dec. 164), since there is no statutory provision for the grade of mess sergeant in the Engineer band, the presumption is that Congress did not intend the band to have a mess sergeant, and it is not lawful to detail a mess sergeant to the band under the provisions of Army Regulations 1346.

Ops. J. A. G. 72–200, Aug. 10, 1917.

CONTRACTS: Validity of option for renewal by Government of lease of cantonment sites from year to year.

Covenants giving the Government options for renewal from year to year contained in leases of cantonment sites are perfectly valid. They give the Government no legal interest in the premises beyond the term of the lease, though they do give it the right to enforce the covenants of the landlord in equity.

Ops. J. A. G. 80–710, Aug. 13, 1917.

MILITIA BUREAU: Status after National Guard is drafted into Federal service.

The Militia Bureau is to be maintained as a separate bureau with a general officer as its head during the present war, notwithstanding the draft of the National Guard. Such general officer may be detached and placed in command of troops. Administrative arrangements may be made for access to the records of the Militia Bureau by The Adjutant General and for the employment of clerks of the bureau in the office of The Adjutant General.

Ops. J. A. G. 6–212, Aug. 15, 1917.

PAY AND ALLOWANCES: Absence; Failure of soldier to report to organization after discharge from hospital.

An enlisted man of a militia organization called into Federal service while an inmate of a division hospital, suffering from rheumatism, was sent by order of the commander of such hospital to a civil hospital for treatment. He was subsequently discharged from the latter hospital, but never rejoined his organization which continued in Federal service for some months and was then mustered out. *Held*, that the soldier must be considered as having been absent without leave from the time of his discharge from the hospital until the muster out of his organization. Hence he is not entitled to receive pay or allowances for such period.

Ops. J. A. G. 58–700, Aug. 15, 1917.

RETIREMENT: Pay and allowances; Assignment of retired officer to active duty.

A retired officer, assigned to active duty and ordered to report for assignment to duty, is entitled to full pay from the date he enters upon such duty, and not from the date of notice to him of the original order of assignment. It is immaterial that the War Department order placing this officer on active duty did not expressly refer to section 24 of the national defense act (39 Stat. 166, 182) and did not purport to be by direction of the President, since it was in fact issued as a war measure "for the purpose of relieving an officer still on the active list for duty in the field"; and since, being issued by the Secretary of War, it must be assumed that the order was in fact the order of the President, although the order does not specifically so state.

Ops. J. A. G. 88–630, Aug. 16, 1917.

APPROPRIATIONS: Telegrams sent by Civil Service Commission for benefit of Ordnance Department.

Bills for telegrams sent out by the Civil Service Commission directing in urgent cases eligibles for positions in the Ordnance Department to report for service, are not payable from the authoriza-

tion under the provision in the Army appropriation act (40 Stat. 40, 52) entitled: "Incidental expenses, Quartermaster Corps," since that provision is limited to "cost of telegrams or official business received and sent by officers of the Army."

Ops. J. A. G. 22–011.1, Aug. 20, 1917.

PUBLIC PROPERTY: Rights of Government to make regulations respecting vehicles suspected of carrying liquor into Gettysburg National Park.

The United States has jurisdiction to issue traffic regulations for automobiles using that part of the Emmitsburg Road which extends from the crossing of the Wheatfield Road southwestward to the boundary of the park. The local officers of the Gettysburg National Park have authority to exclude therefrom vehicles suspected of carrying intoxicating liquors, if the persons in charge thereof refuse to allow them to be inspected.

Ops. J. A. G. 80–433, Aug. 21, 1917.

PAY AND ALLOWANCES: Extra-duty pay of Corregidor prison guards.

The members of the battalion of Philippine Scouts kept permanently at Corregidor as prison guards may be granted extra-duty pay in order to make this onerous work attractive and to keep the companies recruited up to full strength. Congress has authorized the Secretary of War to fix the pay of the Philippine Scouts at rates not to exceed those authorized for the Regular Army. Enlisted men of the Regular Army assigned to duty as prison guards receive extra-duty pay by authority of Congress.

Ops J. A. G. 6–250, Aug. 22, 1917.

OFFICE: Eligibility for promotion of officers holding provisional commission.

So far as transfer and promotion are concerned, an officer holding a provisional commission in the Regular Army must be regarded exactly as if his commission were permanent.

Ops. J. A. G. 64–221, Aug. 27, 1917.

APPROPRIATIONS: Expenses of reporters and witnesses at examining boards for promotion and efficiency boards.

Boards for the examination of officers for promotion, and efficiency boards are authorized by law. Where the War Department deems the services of reporters and the presence of civilian witnesses necessary for the proper conduct of the business of such boards, the expenses thereof may be paid from the appropriation (40 Stat. 40, 53), "Incidental expenses, Quartermaster Corps."

Ops. J. A. G. 5–244, Aug. 28, 1917.

PAY AND ALLOWANCES: Procedure on payment of pay due insane officers and enlisted men.

There is no practicable way of covering the payment of pay due insane officers and soldiers except by resorting to legal proceedings for the appointment of a guardian or committee for the insane person. The party being incompetent to receive and receipt for his own pay, if payment is to be made, it is necessary that it be made to some one who has the legal authority to act on his behalf; and

the only one who would have such authority would be a committee or guardian appointed pursuant to law.

Ops. J. A. G. 44–010, Aug. 28, 1917.

EIGHT-HOUR LAW: Contracts for ordnance and ordnance supplies.

Since the Ordnance Department manufactures but a very small fraction of its total needs of horse equipment and artillery harness, and since other bureaus procure these classes of articles entirely by contract, these articles are not, within the operation of the eight-hour act of June 19, 1912 (37 Stat. 137), but fall within the exception therein contained as to classes of articles which may be purchased in the open market. Hence, under existing conditions, contracts for this class of articles are not required to contain the eight-hour provision; and, further, not being within the eight-hour statute, they are not within the provision of the naval appropriation act approved March 4, 1917 (39 Stat. 1168, 1192), requiring extra pay for overtime work.

Ops. J. A. G. 32–313, Aug. 30, 1917.

EIGHT-HOUR LAW: Ohio River dam.

The work of building Dam No. 31, Ohio River, may properly be regarded as within the terms of the Executive order of April 28, 1917, suspending the application of the eight-hour law with respect to contracts having relation to work for national defense. It is recommended that it be so regarded.

Ops. J. A. G. 32–212, Aug. 30, 1917.

OFFICE: Effect of acceptance of commission in one of the component forces of the Army of the United States upon a commission held in another force of said Army.

Except in the cases of officers of the Regular Army whose rights are protected by statute, an officer in one of the component forces of the Army of the United States may not hold a commission in another such component, and if he be appointed to any such second office, he thereby vacates his former commission.

Ops J. A. G. 64–311, Aug. 30, 1917.

OFFICE: Eligibility of women physicians for appointment in the Officers' Reserve Corps.

It is not allowable by law to appoint female physicians to military office in the medical section of the Officers' Reserve Corps of the Army. The provisions of the national defense act (39 Stat. 166) should be construed in connection with other legislation on the subject, which contemplates that officers and soldiers of the military service should be males who are physically fit for the varying duties incident to the military service. Women physicians would not have the physical qualifications which would be required for the performance of all duties which may be required of a medical officer.

Ops. J. A. G. 64–012, Aug. 30, 1917.

PAY AND ALLOWANCES: Mileage of officers on camp-inspection duty.

Officers engaged in the inspection of camp sites may lawfully claim mileage for travel performed under competent orders from railroad stations to camp sites and return to railroad stations.

Ops. J. A. G. 94–210, Aug. 30, 1917.

APPROPRIATIONS: Installation of elevators in an existing building.

The installation of elevators in a quartermaster depot does not fall within the restrictions of section 1136, Revised Statutes, regarding the construction of buildings of a permanent character. The section has no application to repairs or to substantial improvements. The appropriation "Barracks and quarters" is available for the installation of these elevators.

Ops J. A. G. 5–245.1, Aug. 31, 1917.

ARMY: Pay and allowances; Grades of mess sergeant, supply sergeant, and mechanic in supply companies organized under section 2 of selective draft act.

The provisions of section 2 of the selective draft act (40 Stat. 76, 77) authorizing the organization and officering of special and technical troops confers upon the President authority to adopt for the purpose of the organization of such troops any grade known to any branch of the Army with the pay and allowances of that grade, but does not authorize the President to adopt one grade and attach thereto the pay and allowances of another grade. Hence the President may provide, for the supply companies to be organized, a mess sergeant with the pay and allowances of, say, a supply sergeant of Infantry; and a mechanic with the pay and allowances of, say, a mechanic of Field Artillery.

Ops. J. A. G. 6–200, Aug. 31, 1917.

MILITARY INSTRUCTION: Detail of reserve officers as instructors at schools and colleges.

Members of the Officers' Reserve Corps and officers of the National Army, as such, can not legally be detailed as military instructors at schools and colleges, since it is clear from the language of section 45 of the national defense act of June 3, 1916 (39 Stat. 166, 192) that only active or retired officers of the Regular Army can be so detailed.

Ops. J. A. G. 56–314, Aug. 31, 1917.

OFFICE: Rank; Promotions to fill temporary vacancies in the Regular Army.

Promotions to vacancies in the Regular Army caused by the appointment of officers thereof to higher grades in forces other than the Regular Army should be made by promotion, according to seniority, of officers who at the date of such vacancies are serving under commissions in the next lower grade of the arm, staff corps, or department in which the vacancies occur.

Ops. J. A. G. 82–121, Sept. 4, 1917.

PUBLIC PROPERTY: Sale of stores to crews of Army transports.

The Secretary of War may by regulation authorize the procurement and sale to members of crews on transports of supplies necessary for their comfort and welfare during a voyage, the payment therefor to be deducted from their pay when due.

Ops. J. A. G. 94–124, Sept. 7, 1917.

PUBLIC PROPERTY: Transfer of surplus spruce lumber to allied Governments.

The transfer of surplus spruce lumber by this Government to the allied Governments at war with Germany on the basis of reimburse-

ment of the cost of the same should not be regarded as a sale within the usual meaning of the term, and hence does not come within the provisions of section 1241, Revised Statutes.

Ops. J A. G. 76–011.1, Sept. 10, 1917.

APPROPRIATIONS: Damage to railroad equipment on Government tracks at cantonments, etc.

The appropriation "Transportation of the Army and its supplies" (40 Stat. 40, 53) is available for expenses of repairing railroad equipment damaged on Government tracks at Army cantonments and other military stations while in the possession of and operated by the Government.

Ops. J. A. G. 5–247, Sept. 11, 1917.

ACCOUNTS: Examination and settlement of accounts in France.

The examination and settlement of money and property accounts in France are lawful.

Ops J. A. G. 78–380, Sept. 14, 1917.

CONTRACTS: Compulsory orders.

Under section 120 of the national defense act (39 Stat. 166, 213) the mere placing of an order for the supplies or materials required is sufficient without the execution of a formal contract therefor. No advertising for bids in any form whatever or filing of bids is necessary. Revised Statutes, section 3744, and Army Regulations 563, do not apply to such contracts.

Ops. J. A. G. 76–340, Sept. 15, 1917.

ARMY: Organization.

There is but one Army of the United States, and every organization, bureau, officer, and man in the military service is a part of it. Transfers of enlisted personnel from one force to another, in the sense of absolute incorporation in the force to which transferred, is permissible under the law.

Ops. J. A. G. 6–200, Sept. 17, 1917.

ALIENS: Enforcement of Belgian conscription law in the United States.

Under the act of May 7, 1917 (40 Stat. 39), amending section 10 of the Federal Penal Code, the procuring of enlistments in the United States for foreign armies is permitted to those countries at war with a country with which the United States is at war, provided such enlistments are obtained under regulations prescribed by the Secretary of War. This statute can not, consistently with the principle of State sovereignty, be construed to permit any procedure by a foreign government in this country beyond steps to procure *voluntary* enlistments.

Ops. J. A. G. 34–007, Sept. 18, 1917.

RANK: Inclusion of service in District of Columbia Militia as service in determining relative rank.

Service as a commissioned officer of the National Guard of the District of Columbia, not rendered to the United States under a call of draft for Federal service, can not be included as service for the determination of relative rank.

Ops. J. A. G. 82–211, Sept. 18, 1917.

TERRITORIES: Authority of Alaska Road Commission to delegate its functions.

The authority of the Board of Road Commissioners for Alaksa to approve and certify vouchers for payment can not be delegated, even with the approval of the Secretary of War, for the reason that the statute establishing said board specifically requires expenditure of the road and trail portion of the "Alaska fund" (33 Stat. 616) upon vouchers approved and certified by said board.

Ops. J. A. G. 92–160, Sept. 18, 1917.

DISCHARGE: Effect of illegal discharge.

An enlisted man in the National Guard duly signed the Federal enlistment contract provided by section 70, national defense act (39 Stat. 166, 201). Thereafter and upon the completion of three years of service he was discharged, but not in accordance with the requirements of law. *Held*, that such discharge is illegal and not binding on the Government.

Ops. J. A. G. 58–052, Sept. 21, 1917.

UNIFORM: Army field clerks and field clerks, Quartermaster Corps.

While Army field clerks and field clerks, Quartermaster Corps, are officers in the Military Establishment they are not officers of the Army in the sense that they are permitted to wear the uniform of the officer as provided by the terms of section 125 of the national defense act (39 Stat. 166, 216). By the proviso contained in said section the Secretary of War may issue orders designating them as being entitled to wear the uniform of the United States Army and prescribing an appropriate and distinguishing mark. They are not entitled to have their uniforms issued to them by the Government as is done in the case of enlisted men, but are required to purchase them individually.

Ops. J. A. G. 96–140, Sept. 22, 1917.

CLAIMS: Loss by Government of private mount and horse equipment of officer.

An officer, temporarily assigned to mustering duty, on March 21, 1917, turned over to a camp quartermaster for safe keeping his private mount, saddle, blankets, etc. Three months later, when he reclaimed the horse and equipment, they were not to be found, but apparently had been erroneously issued by the quartermaster to some organization. *Held:* (1) the Secretary of War may lawfully grant special authority for the purchase of this horse at a valuation to be determined by a board of officers, subject to the provision of Army Regulations 1095 prohibiting the payment of a greater sum for an officer's horse than the average price paid by the Government for horses for the mounted service during the preceding fiscal year; (2) the loss of the saddle, blankets, etc., does not fall within the provisions of the act of March 3, 1885 (23 Stat. 350), providing for the reimbursement of officers and enlisted men for the value of private property lost or destroyed in the military service.

Ops. J. A. G. 94–011, Sept. 26, 1917.

PAY AND ALLOWANCES: Private mounts of reserve officers.

Only those reserve officers who had acquired private mounts while in the service and prior to the receipt by them of General

Orders, No. 113, War Department, 1917, are entitled to have such mounts shipped and maintained at public expense.

Ops. J. A. G. 94–011, Sept. 27, 1917.

DISCIPLINE: Right of accused to testify as witness or to make unsworn statement.

The accused may, at his option, be sworn and take the stand as a witness, but in so doing he occupies no exceptional status and becomes subject to cross-examination, like any other witness. The accused may make an unsworn written or verbal statement. The making of such an unsworn statement does not subject the accused to cross-examination.

Ops. J. A. G. 30–425, Sept. 28, 1917.

PAY AND ALLOWANCES: Stoppage of pay to satisfy indebtedness for alimony.

There is no statute or Army regulation authorizing the stoppage of a soldier's pay to satisfy a claim for alimony.

Ops. J. A. G. 74–111.3, Oct. 2, 1917.

ALIENS: Naturalization of members of National Guard.

The provisions of section 2166, Revised Statutes, regarding naturalization based on military service in the Armies of the United States do not include service in the militia when in the service of the United States.

Ops. J. A. G. 4–500, Oct. 4, 1917.

PAY AND ALLOWANCES: Commutation of quarters and rations of female nurses on duty in the field.

Female nurses on duty in the field are not entitled to commutation of quarters when tent quarters are available. They are entitled to commutation of rations at the rate of $1 per day only in the event that rations in kind can not be economically issued. If such rations in kind can be so furnished, they are entitled to commutation of rations at the rate of 40 cents per day.

Ops. J. A. G. 6–227.2, Oct. 4, 1917.

PAY AND ALLOWANCES: Stoppage of pay for damages to property, effect upon, where trial by court-martial results in acquittal.

The findings of a board of officers appointed to investigate and fix the amount of damages to a Government motor car in assessing the amount of the damages against a soldier, should not be set aside merely because the soldier was thereafter tried by court-martial for acts connected with such damages to the motor car and was acquitted therefor.

Ops. J. A. G. 80–010, Oct. 4, 1917.

INSIGNIA OF MERIT: Unauthorized wearing of service ribbons.

The unauthorized wearing by civilians of campaign badges is made unlawful by section 125 of the national defense act. (39 Stat. 166, 216.)

There is no statute forbidding their unauthorized use by officers or enlisted men, but such persons may be subjected to disciplinary action.

Ops. J. A. G. 46–300, Oct. 5, 1917.

OFFICE: Pay and allowances; De facto officer rendering services while awaiting result of physical examination.

Payment can not be legally made for services rendered by a civilian physician as a medical officer for the period between the time of his appointment and his subsequent notification that he had failed to pass his physical examination, since he was simply a *de facto* officer during such period. It is immaterial that the said notification was delayed through oversight on the part of the military authorities, and that the appointee, having in the meantime been ordered to service, rendered such services in good faith.

Ops. J. A. G. 58–700, Oct. 5, 1917.

AUTOPSY: Right to perform; Oath of enlistment not required of drafted men.

A division surgeon has the legal right to perform an autopsy in all cases of death of officers and enlisted men, including drafted men, if there is a sound military reason therefor.

Drafted men need not and ought not to be sworn into the service.

Ops. J. A. G. 6–227.6, Oct. 6, 1917.

MEDICAL TREATMENT: Legality of requirements as to vaccination and inoculation in the Army.

The Secretary of War may take, and it is his duty to take, such means to preserve the health of the Army as medical science considers reasonably necessary and desirable. Hence, individual objections to vaccination and inoculation should be disregarded.

Ops. J. A. G. 6–227.6, Oct. 6, 1917.

DESERTION: Administrative determination that escaped garrison prisoner is a deserter.

For the purpose of securing his apprehension it is competent for the military authorities to determine administratively that an escaped garrison prisoner is a deserter and to offer and pay the reward of $50 for his apprehension and return. It is immaterial to this question whether or not he is thereafter tried for desertion.

Ops. J. A. G. 26–240, Oct. 8, 1917.

OFFICE III A 1 c.

Except as regards the Officers' Reserve Corps, veterinarians, and promotion from the ranks, persons not citizens of the United States may lawfully be commissioned officers of the Army of the United States.

Ops. J. A. G. 64–213.1, Oct. 13, 1917.

ARTICLES OF WAR LXXII H.

The auxiliary remount depots at the several camps are subject to the court-martial jurisdiction of the commanding officers of the department within the territorial limits of which such camps may be located. General Orders, No. 96, W. D., July 20, 1917, amending paragraph 191, A. R., does not withdraw them from such jurisdiction.

Ops. J. A. G. 30–320, Oct. 16, 1917.

ENLISTMENT I A: Army II; War I C.

The act of July 24, 1917, authorizing the President to increase temporarily the Signal Corps of the Army, does not empower him to recruit Signal Corps regiments to assist in the work of cutting spruce timber in logging camps, to be used in airplane construction. If other means of obtaining the necessary materials had failed, the President, as Commander in Chief, would have power to cause the work to be done directly by the military forces.

Ops. J. A. G. 6–020, Oct. 19, 1917.

ALIEN ENEMIES: Prohibited zones.

A citizen of Germany who is an enlisted man in the Army of the United States is not forbidden by the President's proclamation of April 6, 1917, to go within one-half mile of any fort, etc., when ordered to do so by his superiors.

Ops. J. A. G. 99–211, Oct. 26, 1917.

SIGNAL CORPS: Rating of junior military aviator.

Section 6 of the act of July 24, 1917 (40 Stat. 243, 244), provides that no person shall receive the rating of military aviator until he shall have served creditably for three years as an aviation officer with the rating of a junior military aviator, except that in time of war any officer or enlisted man who especially distinguishes himself in active service may, upon recommendation of the Chief Signal Officer of the Army, be rated as a military aviator without regard to examination or to length of service. The service referred to is service in the forces of the United States, and service in the Army of any other nation can not be made the basis of the rating of military aviator.

Ops. J. A. G. 72–181, Oct. 26, 1917.

SELECTIVE-DRAFT ACT: Intoxicating liquors; Sale of intoxicating liquors within 5-mile zones and to persons in military service.

Under the provisions of section 12 of the selective-draft act of May 18, 1917 (40 Stat. 76, 82), and the regulations made by the President thereunder, respecting the prohibition of intoxicating liquors, violations of such law when committed by civilians are civil offenses and should be brought to the attention of the local United States attorney with a request that such offenders be prosecuted, violations by persons subject to military law should be made the subject of disciplinary action either by trial by court-martial under article of war 96 or by other appropriate means.

Said section 12 legislates for three respective territorial sections: (1) Territory within 5 miles of military camps exclusive of that portion of cities or towns which is more than one-half mile from any portion of such camps; (2) territory coextensive with military stations, cantonments, camps, forts, posts, officers' and enlisted men's clubs being used for military purposes; (3) all territory within the jurisdiction of the United States.

Military camps within the contemplation of section 12, *defined.* What constitutes a violation of the statute in the several localities above enumerated, *explained.*

Ops. J. A. G. 48–100, Oct. 30, 1917.

ENLISTMENT I B 2—MARINE CORPS.

Section 7 of the act of May 18, 1917, continuing in force during the present emergency all enlistments in force on the date of its approval, applies only to the Army and does not apply to the Marine Corps.

Ops. J. A. G. 28–240, Oct. 31, 1917.

PAY AND ALLOWANCES: Right to expert rifleman's pay where Cavalry is reorganized temporarily as Field Artillery.

The requirement of paragraph 1345, Army Regulations, that the allowance of additional pay to an expert rifleman, sharpshooter, or marksman shall be payable only so long as the soldier in question continues to be a member of an organization armed with a rifle, should not be regarded as applicable to the members of Cavalry regiments reorganized temporarily as Field Artillery regiments; but the existing rifle qualifications of such men should continue for such time as is reasonably necessary for them to qualify in the equivalent rating in the Field Artillery.

Ops. J. A. G. 242.142, Nov. 3, 1917.

SELECTIVE-DRAFT ACT: Militia; Preservation of integrity of National Guard organization called into Federal service.

The War Department is under no obligation to preserve the integrity of the National Guard units drafted into the Federal service. The National Guard element of the Army of the United States is not to be distinguished from any other composite element thereof, and, with certain exceptions as to certain officers, all members of the Army of the United States are upon the same plane, under the same legal obligation, and have the same legal duties. During the war there is but one Army, the Army of the United States, and every organization, bureau, officer, and man in the military service is a part of it. Accordingly, members of the Army of the United States drafted therein from coast artillery organizations of the National Guard have no more legal connection with the Coast Artillery than with any other branch of the service, and they may be assigned to any branch of the service and organized and officered as the President sees fit.

Ops. J. A. G. 322.7, Nov. 3, 1917.

PAY AND ALLOWANCES: Second-enlistment pay after service in Philippine Scouts.

Enlisted service in the Philippine Scouts entitles a soldier to second-enlistment pay upon enlistment in the Regular Army.

Ops. J. A. G. 242.121, Nov. 20, 1917.

APPROPRIATIONS: Emergency printing procured from a commercial printing company.

Owing to very slow delivery of work by the Government Printing Office, the gun division, office of the Chief of Ordnance, informally procured from a commercial printing establishment a supply of paper printed to order at a cost of $224. The bill may be paid upon approval of the order and the voucher by the Secretary of War, payment to be made from the appropriation "Contingent expenses of the War Department."

Ops. J. A. G. 486.4, Dec. 4, 1917.

RETIREMENT: Retirement of provisional second lieutenant.

There is no authority in law for the retirement of a provisional second lieutenant found incapacitated for service by reason of a disability incurred in line of duty.

Ops. J. A. G. 210.85, Dec. 6, 1917.

DISCIPLINE: Disloyal officers and soldiers.

In all cases where officers and soldiers in the Army of the United States demonstrate by their conduct or speech disloyalty to the Government of the United States and sympathy with its enemies the following general policy is recommended:

(*a*) In the case of any officer or soldier who has by his speech or conduct demonstrated an attitude or committed an act of disloyalty, it is recommended that he be brought to trial by a general court-martial as promptly as possible, whenever the necessary data can be obtained as a basis for charges.

(*b*) If suitable data for such charges can not be obtained, it is recommended that a suspected officer be dismissed or discharged under the authority of the particular statute which may apply in his case, and that a suspected enlisted man be discharged from the service.

(*c*) If any such officer so dismissed or discharged, or any such enlisted man so discharged, from the service be found to be an alien enemy of the United States it is recommended that he be promptly interned for the period of the war, and that if he be a citizen of the United States or an alien, not an alien enemy, that he be promptly reported to the civil authorities for surveillance and for such action as may be found possible to take against him under the authority of existing law or of any statute hereafter enacted by Congress.

Ops. J. A. G. 250.45, Dec. 8, 1917.

DESERTION: Discharge; Disposition of alleged deserter.

The commanding general of a tactical division, to whose command an alleged deserter has been delivered, should have a physical examination made of the soldier. If such examination shows him to be fit for service, and if in the judgment of such commanding general the interests of the Goverment so dictate, the soldier may be returned to his company commander, whether or not a request of such return has been made by his company commander. (A. R. 126.) When an alleged deserter, returned to military control, is found to be physically unfit for service, if he refuses to admit desertion, and if it be deemed inadvisable to try him for his alleged offenses, application should be made to the Secretary of War for authority to discharge him without trial. (A. R. 126.) A soldier so discharged should be given the certificate of discharge provided for in subdivision 3 of Army Regulations 150.

Ops. J. A. G. 319.12, Dec. 17, 1917.

APPROPRIATIONS: Heat and light for buildings of Knights of Columbus.

There is no statutory authority under which fuel and light can be furnished by the Government to the buildings of the Knights of Columbus at the cantonments, and the War Department has no authority to permit the disposition of public property except as provided for by Congress.

Ops. J. A. G. 680.32, Dec. 19, 1917

INDEX.

[References are to pages.]

ADDITIONAL COPIES
OF THIS PUBLICATION MAY BE PROCURED FROM
THE SUPERINTENDENT OF DOCUMENTS
GOVERNMENT PRINTING OFFICE
WASHINGTON, D. C.
AT
50 CENTS PER COPY